THE PROCEEDINGS AGAINST Sir *John Fenwick*, Bar.

UPON A

Bill of Attainder

FOR

High Treason.

TOGETHER

With a Copy of a LETTER sent by Sir *John Fenwick* to his Lady, upon his being Taken in *Kent*.

AS ALSO

Of the PAPER delivered by him to the Sheriffs of *London* and *Middlesex*, at the Place of his *Execution*.

8°

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THE PROCEEDINGS AGAINST Sir *John Fenwick* Bart *&c.*

Veneris 6. die Novembris, 1696.

ADmiral *Ruſſel* Acquainted the Houſe of Commons, That His Majeſty had given leave to lay before the Houſe ſeveral Papers in the Nature of Informations of Sir *John Fenwick*, in which, He, and ſeveral other Perſons of Quality were reflected on; and deſir'd that they might be brought up to the Table and Read, and that he might have an Opportunity to juſtifie himſelf, or if he did not, that he might fall under the Cenſure of the Houſe. And thereupon, Mr. Secretary *Trumbal* being preſent, did ſay, That he had His Majeſty's Leave to lay thoſe Papers before the Houſe, and, if the Houſe pleaſed, he would bring them up to the Table.

And accordingly, (the Houſe ſhewing a general Inclination for it,) they were brought up to the Table and Read, (being the Account he gave of the Late Plot under his own Hand, and his Examination taken by Mr. *Vernon*,) and after the ſame were Read the Houſe Ordered, That Sir *John Fenwick* ſhould be brought immediately before them, and that no Perſon ſhould in the mean time Speak with him, or give, or receive any

Paper from him. And the Houſe further Ordered, That the Lord *Cutts*, Sir *Henry Hobart*, and Mr. *Norris*, Three of their Members, ſhould ſee their Order executed.

And in the mean time Adjourned to the Afternoon.

About Five a Clock in the Afternoon Sir *John Fenwick* was brought with a ſtrong Guard (which the Lord *Cutts* had taken Care for) to the Houſe, and being brought to the Bar, Mr. *Speaker* ſpake to him thus,

Mr. *Speaker*. Sir *John Fenwick*, the Houſe underſtand that you have ſhewed ſome Inclinations to make a Diſcovery of the Deſigns and Practices of the Enemies of the Government; you have now an Opportunity to do it, and the Houſe require it from you, That you make a full and ample Diſcovery of all you know of that Matter.

Sir *John Fenwick*. Mr. Speaker, I ſuppoſe the Houſe is not Ignorant of my Circumſtances; I am Indicted of High-Treaſon, and have been Arraigned: What I have done to ſerve the King and Nation His Majeſty knows. It hath been Communicated to him by his Privy Council. I do not know but what I ſay may hurt my ſelf; and therefore I deſire that I may have ſome Security for my Self, and I am willing to tell the full of all I know.

Mr. *Speaker*. Sir, if you pleaſe to withdraw for the preſent the Houſe will ſend you their Pleaſure.

Sir John Fenwick *withdrew*. *Was called in again.*

Mr. *Speaker*. Sir *John Fenwick*, ſince you withdrew, the Houſe have conſider'd of what you ſaid at the Bar. They do not think what you have ſaid is an Anſwer to what they require: They do expect a full and candid Confeſſion from you of what you know, and they think that the beſt way for you to obtain the favour of the Houſe is to deal ingenuouſly with them.

Sir *John Fenwick*. Sir, I am in the Hands of the Law, and I would not do any thing that His Majeſty might be Angry with me, for I do not know it is with His Majeſty's

Majeſty's Conſent: I have Acquainted him fully with all I know of the Matter; this is all the Account I can give you at this time. 'Tis a dangerous Point that I am under; I know not but I may come to my Tryal in a few Days, and what I may ſay may riſe up againſt me in a Court of Judicature: I Humbly propoſe it to the Houſe, if they do not think it a hard Caſe for me to make any Confeſſion here, when His Majeſty hath all that I know. I ſhall be very ready to do what this Honourable Houſe pleaſes to Command me, but I deſire this Houſe will conſider my Circumſtances; I would not offend the King, nor offend this Houſe.

Thereupon, Mr. *Speaker* again ſpake to him to withdraw. And being withdrawn, the Houſe Debated, Whether they ſhould acquaint him with their having thoſe Papers of Informations. But they did not think fit to do it, becauſe, they thought thoſe Papers were a Contrivance, and made by others for him, and that the beſt way to get the Truth out of him would be for him to tell his own Story. And that if the Houſe ſhould let him know they had thoſe Papers, he would only refer to thoſe Papers, as, it was ſaid, he had lately done, when he was examined by the King and Council.

'Twas alſo Debated, Whether there ſhould be any threatning Words uſed to him, but they thought that not proper, for his Confeſſion ought to be free and natural. It was alſo mentioned, Whether they ſhould take notice of His Majeſty's Conſent; but that was not thought fit, being thought derogatory to the Priviledges of the Houſe: So the Houſe Ordered him to be called in again, and Mr. *Speaker* delivered the Senſe of the Houſe to him in theſe Words.

Sir John Fenwick *at the Bar.*

Mr. *Speaker.* Sir *John Fenwick*, The Houſe has conſidered of what you have ſaid, to excuſe your making a Diſcovery of your knowledge of the Deſigns and Practices of the Enemies of the Government, and they

think what you ſtand upon is only an Excuſe. They think you have no Reaſon to apprehend the King ſhould be Angry with you for making any Diſcovery to this Houſe, this being the proper Place to Enquire of all things that relate to the King and Government, eſpecially His Majeſty's Safety; and you ought to Diſcover to them what you know: As to what you ſtand upon, That you ſhould not be prejudiced by what you Diſcover here, I am Commanded to tell you, They do take notice by what you have ſaid here, That you have already, notwithſtanding what you ſay, Diſcovered it to the King and Council; and they Command me to tell you, That you have no Reaſon at all to apprehend, that you ſhall ſuffer any thing if you make a full and free Diſcovery here, no Man that ever did ſo, and dealt candidly with this Houſe, ever did. 'Tis in your Power to deſerve the Favour of the Houſe. 'Tis Requir'd by the Houſe, that you make a Diſcovery, and this is the laſt time that you are like to be asked to do it.

Sir *John Fenwick.* Mr. *Speaker*, I know not what Anſwer to make to this Houſe, I would not willingly offend it. What I have informed the King is a great deal, and a Man would have ſome little time to recollect himſelf; and I have been kept a very Cloſe-Priſoner, and had no conveniency of Pen, Ink, and Paper. 'Tis hard to remember juſt of a ſudden, and I would willingly be ſecure, His Majeſty will not be Angry with me; I was in hopes that His Majeſty would have Informed the Houſe himſelf, he hath all that I know; My Circumſtances are hard, I am in danger every day to be Try'd, and I deſire to be Secur'd, that what I ſay ſhall not riſe up in Judgment againſt me. 'Tis hard to make me accuſe my ſelf under theſe Circumſtances, and very hard to put me on it now.

Mr. *Speaker.* As to what you ſay relating to the fear of His Majeſty's Diſpleaſure, and the other Excuſe, you have had your Anſwer already. As to what you ſay relating

relating to time, if you will now Declare what you know and remember, the Houſe will take into Conſideration, whether they will give you farther time to make up the reſt.

Sir *John Fenwick.* Sir, His Majeſty hath all exactly, 'tis impoſſible for me to inform you of it without Accuſing my ſelf; I do not really know what to ask but a little time, if you would pleaſe to give it me.

Mr. *Speaker.* Sir, you know already what the Houſe require of you.

Sir *John Fenwick.* I do, but 'tis no Excuſe that I have made; what I have told is Truth, to the beſt of my knowledge; I am not very good at Speaking, and if I might have a little time, I ſhall do what they pleaſe to Command me.

Mr. *Speaker.* If that be all you have to ſay, if you pleaſe to withdraw, you ſhall know the pleaſure of the Houſe.

Sir *John Fenwick.* Sir, I deſire the Houſe will conſider of it.

Sir John Fenwick *withdraws. Is called in again.*

Mr. *Speaker.* Sir *John Fenwick*, this Houſe have conſidered what you ſtood upon when you were here laſt, that your Memory was bad, and that you deſired time, but the Houſe think it a Matter of great Moment to the King and whole Nation, That thoſe that are their Enemies ſhould be diſcovered as ſoon as poſſible; and this being a Matter within your knowledge, the Houſe do not think fit to give you time; but if they find by your Diſcovery, that you deal Candidly and Ingenuouſly with them, and have told them as much as you know upon your Memory, they will conſider of your Requeſt of giving you time for the reſt.

Sir *John Fenwick.* When firſt I ſpake to the *Privy-Counſellor*, I propoſed to him, whether I might have a Pardon without being an Evidence againſt any Man, and in that Caſe I would ſerve the King ſo as to tell him all that I knew. It was upon Honour that I did

it to him, and he took the Words in Writing from me, and ſent them to the King in *Flanders*: The King's Anſwer was, That he made no Objection as to my being an Evidence, nor his giving me a Pardon; but that I could expect no Pardon till he knew what I could ſay; upon that, I was incouraged to do what I did for His Majeſty's Service: And I have found in all my Buſineſs ſince, whatever I do or ſay, the Anſwer is, 'Tis not Satisfactory, and I am where I was. When this was done, there was a Meſſage ſent to me from the *Lords Juſtices*, That this was not Satisfactory, and I muſt tell all I know: Now when a Man hath told all he knows, and this muſt ſtill be the Anſwer, 'tis very hard. The King's Anſwer was, That I ſhould more fully make good what I had ſaid. Sir, I did afterwards explain what I had informed that Honourable Perſon, and ſtill it was not Satisfactory. I hope I ſhall not find this from this Honourable Houſe; I am upon my Life, and I hope this Houſe will conſider of it; I know this Houſe is good Security if I had it, but till I have it I am under theſe Circumſtances, and I may at laſt be told all is not Satisfactory; I deſire the Houſe will pleaſe to conſider of it.

Mr. *Speaker*. Sir, you know the Pleaſure of the Houſe you know what they Require of you.

Sir *John Fenwick*. I am very unwilling to Offend the Houſe, but theſe are very hard Circumſtances, to be told when I have done all I can, 'Tis not Satisfactory.

Mr. *Speaker*. Sir, you know what the Houſe does expect, you muſt either give them Satisfaction in it, or withdraw.

Accordingly he withdrew.

And a Motion was made for Leave to bring in a Bill to Attaint Sir *John Fenwick* of High-Treaſon, and after a Debate thereupon, the Houſe divided.

Yeas——179. Noes——61.

So it paſſed in the Affirmative. And Mr. *Att. Gen.* and Mr. *Soll. Gen.* were Ordered to prepare and bring in the Bill.

Lune

Lunæ 9. *die Novembris*, 1696.

The Bill for Attainting Sir *John Fenwick* of High-Treaſon was Preſented to the Houſe, by Mr. *Soll. Gen.* and after a long Debate of ſeveral Hours, the Queſtion was put for the ſecond Reading of it; whereupon, the Houſe divided.

Yeas —— 196. Noes —— 104.

So it Paſſed in the Affirmative, and *Friday* Morning was appointed for it.

The ſame Day the Houſe Ordered, That Sir *John Fenwick* ſhould have a Copy of the Order for Reading the Bill a Second time, and a Copy of the Bill, and that he ſhould be allowed Pen, Ink, and Paper. And that Mr. *Vernon* ſhould then produce a Letter written by Sir *John Fenwick*, Of which he did on *Friday* laſt inform the Houſe.

And further Ordered, That Mr. *Attorney General* and Mr. *Sollicitor General*, ſhould prepare and produce the Evidence againſt him.

Martis 10. *die Novembris*, 1696.

Mr. *Speaker* Acquainted the Houſe, That he had in the Chair Received a Letter from Sir *John Fenwick*, Which was Read. And was in theſe Words,

Newgate Novem. 10.

SIR,

I *Would have Addreſſed my Self in the Humbleſt Manner I could to the Honourable Houſe of Commons, from whom I Received a Copy of a Bill againſt me with their Order; but my Keeper will not Carry any Paper from me but to your Self, to whom I durſt not preſume to ſend a Petition to deliver for Me. Therefore I Beg the Favour you will Pleaſe to Acquaint the Houſe, That it is my Humble Petition to them, Thet they would give Leave for my Counſel, Sir* Francis Pemberton, *Sir* Thomas Powys, *and Sir* Bartholomew Shower, *to come to me, with my Sollicitor,* Chriſtopher Dighton, *to Adviſe with alone. The Keeper will not ſo much as let me ſend the Copy of the Bill and order to my Sollitor, ſo it is of no uſe to me: I Humbly Beg they will Pleaſe to give Order, That I may have all Aſſiſtance that is neceſ-*

ſary for me, and that you will Pardon this Trouble from,
Sir,

Your moſt Humble Servant,
John Fenwick.

Upon this Letter, the Houſe did readily allow Sir *John Fenwick* the Counſel he deſired, and that they might be alone with him; and after ſome Debate, did give Leave that he might have the Solicitor he deſired, tho' it was ſaid his Solicitor was a very great *Jacobite*; and it was inſinuated, That he was ſuſpected to be concerned in the Eſcape of *Goodman*; but it was alſo ſaid, That he had been made uſe of as his Solicitor to prepare for his Tryal, and before that, in other Matters, and ſo that it might not be thought that there was any Hardſhip upon him, in that reſpect the Houſe thought fit to allow Mr. *Dighton* to be his Solicitor.

Jovis 12 *die Novembris*, 1696.

A Petition was Preſented from Sir *John Fenwick* as follows.

To the Honourable the Knights, Citizens, and Burgeſſes in Parliament Aſſembled.

The Humble Petition of Sir *John Fenwick*, Bar.

Sheweth,

THat there being a Bill of Attainder brought into this Houſe for the Attainting of your Petitioner of High-Treaſon, and your Petitioner is Adviſed, That there are many weighty Reaſons to be offered againſt the ſaid Bill.

Your Petitioner therefore moſt Humbly Prays, That your Honours will be Pleaſed to hear him by his Counſel againſt the Paſſing of the ſaid Bill at the Bar of this Honourable Houſe; and to appoint ſuch time for the ſame, as to your Honours ſhall ſeem meet. And your Petitioner ſhall ever Pray, &c.

J. Fenwick.

Thereupon it was Ordered that Sir *John Fenwick* be allowed two Counſel at the Bar of the Houſe to make his Defence.

Veneris

Veneris 13 *die Novembris*, 1696.

Mr. *Speaker* this day Acquainted the Houſe, that he had the Night before (after he came Home) received a Letter from Mr. *Fuller*, which he thought fit to Acquaint the Houſe with, but the ſaid Mr. *Fuller*'s Character was ſo well known to the Houſe that upon a Queſtion for Reading of it, it Paſſed by a great Majority in the Negative; ſo that there was no Diviſion upon that matter, but the Letter was writ in the Words following.

SIR,

I *Preſume that no Perſon whatever, in the Intereſt of the Preſent Government, hath been more Actually Engaged with Sir* John Fenwick *than my Self, it being my Fortune ſeveral times to bring Letters to him from the Late King and Queen at St.* Germains, *and to carry his Anſwers; I have alſo been with him at the Private Conſults of the Late King's Adherents, as my Informations Aſſert; ſo that if I may be Serviceable to the detecting his Treaſons, I ſhall be very ready to ſerve the Government, and to Demonſtrate my Integrity. I am, Sir,*

Your Honours moſt Humble
and Devoted Servant,
W. Fuller.

Sir *John Fenwick* was brought to the Houſe, (by Order) from the Priſon of *Newgate*; and there being a very great Company of Strangers, both in the *Lobby* and *Speaker*'s *Chambers*; and the Houſe being full of Members, to prevent the Inconvenience that ſuch a number of People crowding in might occaſion, the *Lobby* was Ordered to be cleared of all Perſons that were not concerned, and alſo the *Speakers Chambers*; and that the Back-Door of the ſame ſhould be Lock'd, and the Key laid upon the Table: But it being underſtood, That the Lords had favoured the Members of the Houſe of Commons upon other occaſions with reſpect to their Lordſhip's Debates; there was private Intimation given to the Serjeant to let them remain in the *Speaker's Chambers*, when others were removed.

Then

Then Sir *John Fenwick* was ordered to be brought to the Bar: But it being a Proceeding of that Nature, that none of the Ancienteſt Members could readily give a Precedent of, It was neceſſary to ſettle ſome Preliminaries; and the firſt Queſtion that was moved, was, Whether the Mace ought to ly upon the Table when Sir *John Fenwick* was in the Houſe, or whether the Sergeant ought not to ſtand by him with it at the Bar?

Mr. *Smith*, Sir *John Fenwick* being a Priſoner, the Mace ought to be at the Bar, and then no Member can ſpeak.

Mr. *Boyle*. This Hearing of any thing I can think of, is moſt like the Hearing of an Election, and then the Mace is upon the Table, and every one has liberty to ſpeak and ask Queſtions.

Mr. *Chanc. of Exchеq.* The Mace ought not to be upon the Table, becauſe he is a Priſoner: The Sheriffs of *London* can't have him in Cuſtody here, and ſo they deliver him into Cuſtody of the Sergeant.

Mr. *John Howe*. That Argument would be good, if he could not be in Cuſtody of the Serjeant unleſs he had the Mace in his Hand.

Mr. *Brotherton*. The Mace ought to be upon the Table, becauſe the Bill is to be Read.

Sir *Chr. Muſgrave*. The Mace ought to be upon the Table. Never any Bill was Read but the Mace was upon the Table.

Col. Granville. If the Mace be not upon the Table, it would be a great Hardſhip to the Members that they cannot ſpeak, and a great Hardſhip upon the Priſoner that he cannot ask any Queſtions. My Lord *Torrington* was brought Priſoner from the *Tower*, and upon Account of his Quality the Houſe did not let him go to the Bar: But while he was in the Houſe the Mace was upon the Table, and he gave an Account of the whole Campaign, and every Body was at Liberty to ask what Queſtions they pleaſed.

Mr. *Attor. Gen.* The Matter is very New; and I think 'tis neceſſary you reſolve upon the Method before you

you call in the Council, that you may acquaint the Counſel with it: I think it not proper that the Mace ſhould be upon the Table, becauſe he is a Priſoner, though it may not be neceſſary that the Sergeant ſhould have it upon his ſhoulders all the time, but he may eaſe himſelf. I believe you will ask Sir *John Fenwick* what he has to ſay, but no Queſtions to make him accuſe himſelf: And I humbly propoſe it to you, That after the Council is called in, they may open the Nature of the Evidence againſt Sir *John Fenwick*; and then you will conſider, whether you will permit them to go on, or they ſhall withdraw, and the Houſe will conſider what Queſtions ſhall be asked.

Col. Mordant. I hope the Queſtions will be taken down upon a Paper by *the Speaker*, and then read to us, that we may ſee if they be right, and ſo asked by *the Speaker*.

Sir *Wil. Williams.* If the Mace is not upon the Table, our Mouths are Muſled; we are in the Nature of Judges, and ſhall we paſs a Vote that the Judges ſhall not ask any Queſtions?

Sir *Tho. Dyke.* I can't be informed without asking of Queſtions: I know not whether you are a Houſe without it, without having the Mace upon the Table. And will you Act in your higheſt Capacity without being a Houſe? I do not know how it was when the Lord *Torrington* was here, but when the Duke of *Leeds* was here, the Mace was upon the Table.

Mr. *Boyle.* I wiſh you had appointed a Committee to have ſettled the Preliminaries, and that the Bill had not been brought in at all; what is Laboured as a Matter to avoid delay may occaſion more. For though when you carry the Mace from the Table, no Member hath the Liberty to ſpeak, yet any Member hath Liberty to deſire that the Council may withdraw, and then they muſt withdraw, and the Mace muſt be brought upon the Table.

Mr. *Chanc. of Excheq.* That Gentleman is certainly in the right; But I think the Mace muſt not be upon

on the Table when the Priſoner is here; and I think the Queſtions muſt be asked by the Chair.

The longeſt Examination that I remember was that of the *Admiralty*, and then the Queſtions were asked by the Chair. For the Inſtance of my Lord *Torrington*, 'tis true he had not the Mace with him, but he came at his own Requeſt, he came to give you an Account of his Proceedings, and in that Caſe not a Queſtion was asked by any Member; any Member hath Liberty to propoſe any Queſtion, but it muſt be asked by the Chair.

Afterwards the Queſtion was put, and it Paſſed, That Sir *John Fenwick* ſhould ſtand with the Mace at the Bar.

Then a Queſtion aroſe about Reading of the Bill: Some Gentlemen ſaid it could not be Read when the Counſel was preſent, (and they ſeemed to be under a Difficulty by having paſſed the laſt Queſtion;) others ſaid, It was not neceſſary to Read it whilſt Sir *John Fenwick* was preſent, he having had a Copy of it; but at laſt it was thought reaſonable, it being in the Nature of a Charge upon him, that it ſhould be Read to him when preſent with his Counſel; and 'twas ſaid, it was done in the Caſe of Indictments, though Copies were delivered to the Priſoners: But it ſhould be Read only as a Matter of Form, as a Charge to which he was to Anſwer; but it could not be reckoned a Second Reading, according to the Rules of the Houſe, the Mace being off the Table, and therefore it ſhould be Read again when the Counſel and he were withdrawn.

And it was ſaid, That the Journals did take Notice that in ſome Caſes, as in the Caſe of an adjourned Debate, ſome Bills had been read Four times, and it was agreed, that the Bill ſhould be read to him in the Preſence of his Counſel, and ſo that Difficulty was ſolved.

And the Sergeant took the Mace, and brought Sir *John Fenwick* to the Bar; and Counſel was admitted for him, and for the Bill, *Viz.* For the Bill

Mr.

Mr. *Sergeant* Gould, *King's Sergeant, and* Mr. *Sergeant* Lovel *likewiſe King's Sergeant*, and Recorder of *London*.

And Sir Thomas Powys, *and Sir* Bartholomew Shower, *for Sir* John Fenwick.

And Mr. Speaker opened the Matter thus.

Mr. Speak. Sir *John Fenwick*, the Houſe have received Information that you have been in a horrid Conſpiracy againſt the Life of his Majeſty, and for bringing in a *French* Force to invade this Kingdom; that you have been Indicted thereof; and they have conſidered the Nature of the Crime with which you ſtand Charged, and how deſtructive it would have been (if it had ſucceeded) to the very Being of this Kingdom; and therefore that you may not go unpuniſhed, if you are guilty, have ordered a Bill to be brought into this Houſe to Attaint you for High Treaſon, which hath been once read, and will be now read to you at the Bar; and then you will hear the Evidence againſt you, and have Liberty to make your Defence: And though you cannot claim any Right thereto, this Houſe (to ſhew how ready they are to Favour you, in giving you any reaſonable help to make your Defence) do allow you Counſel to aſſiſt you therein; and having granted you this their Favour, they do expect that you will make a good uſe of it. I am likewiſe to acquaint thoſe that are your Counſel, That this Houſe do reckon their own Prudence will ſo guide them as not to give any juſt Offence to this Houſe; and that they will not be allowed to queſtion the Power of Parliaments to paſs Bills of Attainder when they judge it requiſite, of which this Houſe are more proper Judges than any private Perſon, and therefore they will not allow you to debate that Point.

Let the Bill be Read.

Clerk of the Houſe of Commons reads.

WHereas, *Sir* John Fenwick, *Bar. was upon the Oaths of* George Porter, *Eſq; and* Cardel Goodman, *Gent. at the Seſſions of* Oyer *and* Terminer *held for the City of* London,

don, *on the 28th day of* May, *1696. Indicted of High-Treaſon, in Compaſſing and Imagining the Death and Deſtruction of His Majeſty, and adhering to His Majeſty's Enemies, by Conſulting and Agreeing with ſeveral Perſons (whereof ſome have been already Attainted, and others not yet brought their Tryal for the ſaid Treaſons) at ſeveral Meetings to to ſend* Robert Charnock, *ſince Attainted and Executed for High-Treaſon in Conſpiring to Aſſaſſinate His Majeſty's Sacred Perſon, (whom God long Preſerve) to the Late King* James *in* France, *to Incite and Incourage the* French *King to Invade this Kingdom with an Armed Force, by Promiſing to joyn with and Aſſiſt him with Men and Arms upon ſuch Invaſion. And whereas, the ſaid Sir* John Fenwick *did obtain His Majeſty's Favour to have his Tryal delayed from time to time, upon his repeated Promiſes of making an Ingenuous and full Confeſſion of his Knowledge of any Deſign or Conſpiracy againſt His Majeſty's Perſon or Government, and of the Perſons therein concerned; And whereas, he has ſo far abuſed His Majeſties great Clemency and Indulgence therein, That inſtead of making ſuch Confeſſion he hath contrived and framed Falſe and Scandalous Papers as his Informations, reflecting on the Fidelity of ſeveral Noble Peers, divers Members of the Houſe of Commons, and others, only by Hearſay; and Contriving thereby to Undermine the Government, and create Jealouſies between the King and his Subjects, and to ſtifle the real Conſpiracy. And whereas,* Cardel Goodman, *one of the Witneſſes againſt the ſaid Sir* John Fenwick, *to Prove the ſaid Treaſon, lately and ſince the ſeveral times appointed for the Tryal of the ſaid Sir* John Fenwick *at one of which times the ſaid Sir* John Fenwick *had been accordingly Tryed, had it not been for the Expectation of the ſaid Diſcoveries ſo often promiſed by him is withdrawn; ſo that the ſaid* Cardel Goodman *cannot be had, to give Evidence upon any Tryal. Be it Enacted by the King's moſt Excellent Majeſty by and with the Advice and Conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That the ſaid Sir* John Fenwick *be, and is hereby Convicted and Attainted of High-Treaſon,*

and

and ſhall ſuffer the Pains of Death, and incur all Forfeitures as a Perſon Attainted of High-Treaſon.

Mr. *Speaker.* Mr. Sergeant *Gould*, the Houſe expects from you, and Mr. Sergeant *Lovel*, that you open the Evidence you have to prove the Suggeſtions of the Bill.

Mr. Sergeant *Gould.* Mr. *Speaker*, we are here in Obedience to your Commands to give an Account of the Charge, and likewiſe of the Evidence of Fact, that is againſt this Gentleman, Sir *John Fenwick.* The Charge againſt Sir *John Fenwick* is for High-Treaſon, and High-Treaſon of the higheſt Degree; 'tis no leſs than a Deſign of Depoſing the King, and ſubverting the Government, and ſubjecting it to a *French* Arbitrary and Slaviſh Power. It further Charges, That in Proſecution of this Conſpiracy he hath met together, with ſeveral others, who Conſulted, Conſented, and Agreed together, to bring in a *French* Army upon us; and in order to that, as a particular Overt-Act, it is Charged, That they contrived to ſend one to the Late King *James* to bring a *French* Power upon us. It is Charged likewiſe, That he Conſpired to Levy War upon us, and for that purpoſe did provide Piſtols, and other Warlike Arms. This I take to be the Subſtance of the Charge againſt Sir *John Fenwick.*

Now, may it pleaſe you, Mr. *Speaker*, as for the Evidence of the Fact Charged and alledged againſt this Gentleman; It is no Secret certainly to any at this time of day (after ſo many Tryals, ſo many Convictions, ſo many Attainders) that for ſome years laſt paſt there hath been a Wicked Conſpiracy to bring in a *French* Power upon us, to ſubvert this good Government, and to Depoſe the King; but God Almighty, by ſpecial Providence, hath always prevented and diſappointed them. We know ever ſince the Buſineſs of *La Hogue* (in which even by a Miracle God diſappointed them) they have been ſtill reſtleſs, and have been induſtrious to ſet up again this Deſign; and have not had

had any regard to the King's Mercy ſhewed to them, in Paſſing ſeveral Acts of general Pardon, but have ſtill perſiſted in the ſame Deſigns.

As to the Charge upon this Gentleman at the Bar, we ſhall ſhew you that in Time, in the Year 1694. for ſeveral Months there was a Conſpiracy carried on, but did not take Effect; afterwards, I think the beginning of *June*, or latter end of *May*, there were ſeveral Conſults, or Meetings, at the King's Head Tavern at the upper end of *Leadenhall-Street*, where this Gentleman that now ſtands Charged at the Bar was preſent; there were ſeveral Gentlemen, and among the reſt (as it hath and will appear upon Evidence) there was Sir *John Fenwick*, my Lord *Montgomery*, Captain *Porter*, and *Goodman*: It was then propoſed, That one *Charnock* (ſince Executed, and agreed by all to be preſent) ſhould go over into *France* to the Late King *James*, to Communicate to him their Reſolution and Sincerity in being ſerviceable to him in Levying War here to depoſe the King, and ſubvert the Government; who was to intercede with the *French* King, ſo that there might be Forces ſent from *France*. But after this, *Charnock* (preſent ſtill this Gentleman) comes and propoſes this Thing again, to try whether they were ſincere and real in their former Reſolutions: To which they all did then again agree and declare their aſſent, That it ſhould be done, and they were very zealous in the Matter, and the Forces were at that Time propoſed. And what was that? Why truly, no leſs than 8000 Foot, and 2000 Dragoons of *France*, with an Aſſurance of 2000 Horſe from this Countrey. *Charnock* did go into *France*, and did Communicate this Matter; and after he had Communicated it he came back, and brought Anſwer, That King *James* had endeavoured to anſwer their Expectations, but at that time the *French* King could not ſpare his Forces, but however returned his Thanks to them.

This paſſed on till *Chriſtmas* laſt. Then comes over Sir *George Barclaye* upon this Expedition, and there was a Com-

a Commiſſion prepared for that purpoſe; and as to one part he brought along with him a Detachment of ſome of King *James*'s Guards, who were to Aſſaſſinate the King. The next part was for raiſing a Rebellion; now that fell to Sir *John Fenwick*'s part. As to the Aſſaſſinating part, you have had ſeveral Examples made already. This we have Evidence to prove, and if we prove this Matter as we have opened it, then I think there is no Perſon whatſoever, but will agree that this is High-Treaſon in the higheſt Degree. Now, Sir, here ſtands our Matter; here was an Indictment found according to the Law you made laſt Seſſions of Parliament, by two Witneſſes, to one Species of Treaſon againſt Sir *John Fenwick*; (we have one of theſe Witneſſes here, *viva voce*,) but Sir *John Fenwick* hath Protracted his Tryal by frequent aſſurances of making a Diſcovery, which hath determined in what you have already mentioned in your Bill, That Sir *John Fenwick* hath not been Try'd; whereas, he had been Try'd in Courſe, without theſe Applications, and found Guilty: But, now he hath had all this time, at laſt, *Goodman* is withdrawn, and we think (but that we muſt leave to the Judgment of this Honourable Houſe) it may be reaſonably ſuppoſed, by Contrivance to take off the Proſecution of Sir *John Fenwick*. For why? The Inference is from a Fact that we ſhall prove to this Honourable Houſe: There hath been the like Attempt upon Captain *Porter*, but Captain *Porter* hath been more ſtedfaſt, he hath been ſo reſolved, that he ſtood his ground; and to ſpeak the Truth, notwithſtanding he hath been highly Tempted; for we ſhall prove to you, that one *Clancy* came to Captain *Porter*, and Tempted him to withdraw into *France*, with aſſurance of a Pardon, and he had Three Hundred Pounds paid him in hand, and Three Hundred more he was to be paid when he ſhould come into *France*, to be remitted by Bills of Exchange; beſides he was to have 300 *l.* a Year;

100 *l.* from my Lord *Alisbury*, 100. *l.* from my Lord *Mongomery*, and the other 100 *l.* a Year from Sir *John Fenwick*, and this was to be an Annuity during his Life. And thus far we ſuſpect Sir *John Fenwick* may be concerned; for his Lady came (he did not come Perſonally, but his Lady did) and gave her Honour and Aſſurance, that it ſhould be all performed, and much more, if he would withdraw himſelf.

Captain *Porter* preſently made a Diſcovery of this, but accepted the 300 *l.* which was paid down; upon this it hath been ſo far proceeded, that *Clancy* hath been Indicted for it, and Convicted, and hath received Judgment, and I ſuppoſe there hath been Execution. We have the Record of all theſe Proceedings.

We have this Circumſtance farther in the Caſe (which it is my Duty to open to this Houſe) to ſhew what labour there hath been to ſtifle the truth of the Fact. Upon taking of Sir *John Fenwick*, there was one *Webber* taken with him, and he ſlid a Letter into one *Fowl*'s Hand, and this was to be ſent to my Lady *Fenwick*; And what is the Import of this Letter? The Import of it is (They could not prevail with *Porter*, as I opened juſt now, therefore) you muſt influence the Jury, get two or three ſtout Jury Men to ſtarve the reſt, for we have nothing elſe to depend upon: Theſe things we ſhall humbly offer to prove according to our Duty, and according to the Order of this Houſe, and then leave Sir *John Fenwick* to make his Defence.

Mr. Record. Sir, In what I ſhall ſay, I ſhall endeavour, as I ought, to purſue the Method of this Bill; and firſt, I will take notice, That it is the Pleaſure and Direction of this Houſe, That we ſhould attend this Houſe this Day, to produce the Evidence againſt Sir *John Fenwick*.

The Crime for which he ſtands Indicted is High Treaſon; I preſume the learned Gentlemen on the other ſide will not deny, but that the Compaſſing and

Conſpiring

Conſpiring the Death and Deſtruction of the King is High Treaſon; and that to endeavour it, or ſhew it by an Overt Act, to cauſe a Foreign Power to Invade the Realm, or to hold Correſpondence, or Adhere to the King's Enemies, is likewiſe High Treaſon; and therefore I ſhall not trouble the Houſe to ſay any thing to that one way or another, becauſe I believe they will not deny it.

In the next place the Bill does take notice, That Sir *John Fenwick* hath been Indicted at the *Old Baily* in *May*, 1696. Sir, by a Law of this Parliament made laſt Seſſions, no Man ought to be Indicted of High Treaſon without two Witneſſes. Purſuant to that Law, Sir *John Fenwick* hath been Indicted upon the Oaths of two Witneſſes, Captain *Porter* (whom we have here) and *Goodman* (whom we then had) who did Swear to the ſame Treaſon; and upon the Evidence of theſe two Witneſſes the Jury found the Bill.

We have this further Matter. Before the time the Bill was preſented to the Grand-Jury, there was an Examination taken both of *Porter* and *Goodman* in Writing, and I think it was before a Worthy Member of this Houſe, to whom I Appeal in this Caſe, and in thoſe Examinations (if I miſtake not) the ſame Informations they gave againſt Sir *John Fenwick*, as they gave againſt *Mr. Cook*, and upon the Tryal of *Cook* they were Sworn, and did Juſtifie and Verifie the Informations they had given before. And if you pleaſe, we ſhall call Witneſſes to prove, That upon the Tryal of *Cook*, *Porter* and *Goodman* gave that Evidence that did equally affect Sir *John Fenwick* (for he was then withdrawn, and could not be taken) and the Evidence was, that *Cook*, Sir *John Fenwick*, with my Lord *Aliſbury*, my Lord *Mongomery*, Sir *William Perkins*, Sir *John Friend*, *Charnock*, *Goodman*, and *Porter*, were altogether at a Conſult eſpecially appointed for the carrying on theſe Trayterous Purpoſes. They gave the Court a great deal of trouble, upon the Point whether *Goodman* was there at that

time, and they did call ſome Servants of the Houſe who did prevaricate about that matter, but the Court was throughly ſatisfy'd, and it hath appear'd more plainly ſince, that they did abuſe the Juſtice of the Court, for that *Goodman* was undoubtedly there. Sir, *Cook* upon the Tryal was Convicted, and had Judgment of Death. And, Sir, he is attainted, but it does not become me to ſay, Why he is not Executed? His Majeſty, no doubt, hath great reaſon for it. But this I may ſay, being preſent at the Tryal, nothing was made more plain; and Sir *John Fenwick* appear'd to be equally concern'd.

To ſhew Sir *John Fenwick* is Guilty, I crave leave to add this, he did withdraw himſelf, and fled, and was enquired after with diligence, and at laſt he was found.

We ſhall make good all we have charged him with, by Evidence (we hope) to the ſatisfaction of this Houſe.

Mr. *Speaker*, if you pleaſe, Mr. *Baker*, that is Sollicitor for the King in this Caſe, does attend at the Door with all the Papers. We deſire that he may be let in.

Mr. Speaker. Sergeant, call in Mr. *Baker*.

Which was done.

Mr. *Speaker.* What do you call Mr. *Baker* for?

Mr. *Serg. Gould.* To give an Account of this Indictment, for we have a true Copy from the Record.

Sir *Thomas Powys.* Mr. *Speaker*, ſince I am here Aſſigned Counſel for the Priſoner, by the Allowance of this Honourable Houſe, upon his Application, without my privity, I crave leave humbly to acquaint you on behalf of my Client, That I take it for granted that he is (I am ſure we that are Counſel for him) are a little ſurprized in what the King's Counſel are going about; for in truth, we were not aware, nor do we find that any notice was given to the Gentleman at the Bar, that there would be any

Proceedin

Proceeding againſt him by Examining of Witneſſes, or giving of Evidence; he had (it ſeems) the Vote of the Houſe ſent to him, and likewiſe a Copy of the Bill; but I could not underſtand that the Houſe had given notice that he ſhould be prepared by Witneſſes, if he had any, or be at liberty to produce them. Nor was there the leaſt notice to him, that there would be a Proceeding againſt him by way of giving Evidence. He did, as I find, humbly apply himſelf by Petition, That he might be heard by Counſel againſt the paſſing of the Bill, and I ſhall very carefully obſerve thoſe Directions you gave us, which I hope we ſhould not have ſtood in need of, but have behaved our ſelves as becomes us, and not have drawn in queſtion the Power of Parliaments: I never had a thought to do ſuch a thing; but this I humbly lay before you for your Conſideration, Whether without any ſort of notice that I perceive, he hath had from this Houſe to make his Defence to any Evidence, and conſequently there could be no need of Witneſſes on his behalf (whether you will ſo proceed unleſs he had had forewarning to provide himſelf otherwiſe than by the Printed Votes, which (I ſuppoſe) he had no opportunity of ſeeing, and whether within the Words you are pleaſed to acquaint us with, we may be heard, as to the reaſonableneſs of this Proceeding, that by and by we muſt crave leave to ſpeak unto.

Mr. *Speaker.* Sir *John Fenwick* did Petition, it is true, That he might be heard by Counſel at the Bar againſt paſſing the Bill; but he likewiſe Petitioned for Counſel and a Solicitor, and the Anſwer from the Houſe was, That he ſhould be allowed Counſel to make his Defence.

Sir *Thomas Powys.* Yes, Sir, I have ſeen the Order of the Houſe; and truly there did not any thing occur from it to me, That it ſhould be expected that he ſhould produce Witneſſes, for he praying that he might be heard againſt paſſing of the Bill, and the

Order of the Houſe being that he might have Counſel for making of his Defence, I did not apprehend that it impowered us ſo to be prepared as to bring Witneſſes, eſpecially there being no notice given to him to bring Witneſſes, nor no way for him to compel them to come here.

Sir *Barth. Shower.* Mr. *Speaker*, we do acknowledge that we are ſo far ready as to offer ſome Conſiderations againſt the reaſonableneſs of the Bill. We perceive our ſelves confined not to Argue againſt ſuch Bills in general, and therefore ſhall confine our ſelves as to this Bill againſt Sir *John Fenwick* in particular, and the ſuggeſtions in the Bill; but as to making his Defence againſt matter of Fact, and to Anſwering the Charge made at the Bar, we are not ready. The firſt time we had notice that Sir *John Fenwick* ſhould Attend, or be brought to the Bar, was laſt Night at Nine or Ten a Clock at Night. 'Tis true, the Order ſaid that the King's Counſel ſhould produce Evidence for the Bill upon this day; but it was not Ordered that there might be Evidence produced for Sir *John Fenwick*, or at that time that he ſhould be Perſonally preſent: We are ready, with all ſubmiſſion, to offer what we have to ſay againſt the paſſing of this Bill, upon the Suggeſtions made in the Bill, as Sir *John Fenwick*'s Caſe is there repreſented; but to anſwer them in reſpect of Truth or Falſehood, that we are not prepared to do; whether you will hear them to that before you have heard us, in the other particular, that we ſubmit to you.

Note, *This Order was made the day before at the riſing of the Houſe.*

Mr. *Speaker.* Sir, you had Notice on *Wedneſday* laſt, that Sir *John Fenwick* ſhould have liberty to make his Defence by Counſel; and if you had doubted whether he ſhould be admitted to do it by Witneſſes you might have applied to have known the Pleaſure of the Houſe; But if that be what you ſtand upon, if you will withdraw, you ſhall know the Pleaſure of the Houſe.

Mr.

Mr. *Sergeant Gould.* I muſt confeſs we depended on it, and expected no other Thing than that the Priſoner at the Bar ſhould produce his Evidence. This was our Order, and I apprehended that the Petition meant the ſame Thing; For, as I remember, it was an Order likewiſe that the King's Counſel ſhould produce the King's Evidence: What Reaſon was there for that Evidence, unleſs Sir *John* was to apply himſelf to anſwer it?

Mr. *Recorder.* I beg your leave to obſerve with what Reaſon the Counſel on the other ſide make this Objection; when 'tis the import of this Bill, that Sir *John Fenwick* is guilty of High Treaſon: And your Order ſays, They are to be heard againſt the Bill, that is to ſay, They are to be heard againſt the High Treaſon charged upon him by this Bill. Therefore the Houſe did direct us to produce the Evidence againſt Sir *John Fenwick*, to verify the Suggeſtions of this Bill: And ſo I cannot apprehend what can be more proper at this time, but to prove the Fact againſt Sir *John Fenwick*; and 'tis their Buſineſs to defend it as well as they can.

Sir *Thomas Powys.* What was ſaid by the Learned Gentleman on the other ſide, I hope will be ſome reaſon why we might be of Opinion, that we ſhould not have Occaſion to produce Witneſſes: And the Truth is, This Bill does no where ſo much as ſay, Sir *John Fenwick* is Guilty of High Treaſon; and therefore Mr. *Recorder* was under ſome Miſtake, when he ſaid the Bill charged that he was Guilty. The Bill does not any where make ſuch an Allegation; there is nothing but a Recital that he was indicted for Treaſon; and then it recites, That whereas he had protracted his Tryal by ſuch Means as are mentioned, and *Goodman* had with-drawn himſelf, (but it does not ſay with his Privity;) and then follows the Enacting part, *Be it Enacted, &c.* So that there is no ſuch Thing as any Allegation that he is guilty, whereby we could imagine that that was

the Fact or Queſtion between us. We now offer theſe Things humbly to you, and ſhall readily ſubmit to what you think fit to do in it.

Mr. *Recorder.* Sir *Thomas Powys* ſays, That Sir *John Fenwick* is not Charged with his doing any Act, or being Guilty of High Treaſon; but the Bill takes Notice that he ſtands Indicted for it: Then it will be enough for us to prove, that he ſtands Indicted, unleſs the Houſe think fit to let us go into the Evidence of his being Guilty.

Sir *Bartholomew Shower.* We will not oppoſe the producing Evidence to prove the Suggeſtions of the Bill, and the Recitals made therein: But if they attempt to prove him actually Guilty, by living Witneſſes, as they have opened it here at the Bar, that we humbly beg leave to oppoſe. But if they think fit to prove the Suggeſtions of the Bill, That there was an Indictment, that there were Witneſſes ſworn to it, and one is withdrawn, and the Promiſes of making Confeſſion, and his Prevaricating in that Matter, we are ready to make our Defence to that.

Mr. *Speaker.* Gentlemen, you muſt withdraw before you have the Directions of the Houſe.

Accordingly Sir John Fenwick, and the Counſel on both Sides, withdrew.

And being withdrawn.

Mr. *Speaker.* Gentlemen, you have heard what is ſtood upon by the Counſel for Sir *John Fenwick*: They ſay, if you call only Evidence to prove the Suggeſtions of the Bill, they are ready to anſwer them; but if you call any Evidence to prove Sir *John Fenwick* Guilty of this Conſpiracy, by living Witneſſes, they pretend they are not ready, and ſay, They did not know they ſhould be allowed Liberty to Produce any Witneſſes.

Sir *Tho. Littleton.* Mr. *Speaker*, the Counſel could not think that the Bill ſhould ſet forth that Sir *John Fenwick* was Indicted, but that the Houſe would know by what Means; and that *Goodman* was gone away;

away, and we ſhould not Enquire by what Means. What are the Objections by the Counſel againſt the Bill? Say they, We are ready to give Reaſons againſt the Bill; They do not Speak down-right againſt your Juriſdiction: But, ſay they, we are ready to ſhew 'tis not reaſonable in this Caſe, as ſtand Circumſtances, to paſs this Bill. Sir *John*'s Petition was to be heard down right againſt the Bill, If it was your Intention to hear him to that, and to that only, I Conceive you would not have worded your Anſwer as you did. You ordered him Counſel to make his Defence, and at the ſame time ordered the King's Counſel to produce the Evidence. How could they underſtand it, but to make defence to the Evidence? It may be they have a mind to have another Fee, whether you will think fit, in the Circumſtances you ſtand, to give them further time I do not know: But the Circumſtances of the Kingdom, and King's Life, muſt be conſidered, as well as Sir *John Fenwick*. What is the meaning that they are not prepared? I ſuppoſe it is to have further time. But I think your Order is ſo plainly worded that they could not ignorantly miſtake it.

Lord *Norreys*. I riſe up to the matter of Fact. That Gentleman tells you your Order is plainly worded; 'tis ſo, if they had timely notice of it: But the Counſel at the Bar tell you, they had no notice of this Order till Ten a Clock laſt Night.

Mr. *Speaker*. That noble Lord does Miſtake; for that which they ſay they had no Notice of till laſt Night, was, That Sir *John Fenwick* ſhould be brought hither; but the Notice that he ſhould be heard by his Counſel for his Defence was ſent him the Day before.

Lord *Norreys*. This very Order, for his Majeſty's Counſel to produce the Evidence, was made but upon Thurſday.

Mr. *Speaker*. Then I miſtake. But the Order that was made upon his Petition I ſent away immediately:

ly: But the Order they mean, I ſuppoſe, is that for bringing him hither.

Mr. *Cowper.* Say the Councel for Sir *John Fenwick*, we come prepared to make defence to every thing charged in the Preamble of the Bill, but what is not charged we do not come prepared to make defence to. Now they conceive the Fact of High-Treaſon is not charged upon him by the Bill, and if true, it was of great weight; but as it is, 'tis none: For firſt, 'tis plain, the Preamble recites that he was Indicted of High-Treaſon by the Grand Jury, That is a Charge of High-Treaſon within the Bill; for it ſays, he was Charged by the Oaths of his Country upon the Oaths of Two Witneſſes, and there is the very Overt-Act recited in the Preamble of the Bill. Now allowing this its due Weight, Can any one think that ſits here in his private Judgment, That the High-Treaſon thus recited, as found by the Grand Jury, could be apprehended by Sir *John Fenwick* or his Councel as no part of his Charge? The very Nature of the Bill ſpeaks it; for could any one think, that you would Ground a Bill of Attainder upon a Suggeſtion, that he being Indicted of High-Treaſon had ſpirited away one of the King's Evidence, or for giving falſe Information to the Government. So that this is trifling with the Houſe, with Submiſſion.

Sir *Richard Temple.* Can any Body ſay any thing of the Intention of the Houſe, when 'tis reduced into a Bill? Is it not the Bill that he is to make his Defence to? And the Gentleman that ſpake laſt, ſays, That no Body could think otherwiſe? Why Sir, no Body is to think otherwiſe than the Bill ſtates it.

Now the thing before you is, Whether upon the Suggeſtions of this Bill 'tis fit for you to Paſs it? The Caſe of *Mortimer* was, That he had made his Eſcape, being under an Indictment of High-Treaſon, and it came before the Houſe, Whether upon the Statute of 25 *E.* 3. it was High Treaſon: But they did not debate the Fact.

Now

Now you have brought a Bill here, and all the Ground is, That he was Indicted for High-Treaſon, had thus and thus Prevaricated and Delay'd his Tryal, upon Promiſes of Confeſſion, and in concluſion one of the Witneſſes is withdrawn: Sir, no Man is to make his Defence but to what is in the Bill; nor can you Examine to any thing but what is ſuggeſted in the Bill. If you will put the Iſſue upon the Guilt of Sir *John Fenwick*, he muſt have a fair Tryal in ſome Place, and that he can't have here upon Oath; for upon all Bills of Attainders they have had a fair Tryal above.

Mr. *Smith.* I always thought when a Bill of Attainder was to paſs through this Houſe, That every Man was Concerned to here what Evidence he could, to make it appear whether the Perſon was Guilty of the Facts that were alledged againſt him to condemn him for; and, I take it, the Principal Thing to be conſidered is, Whether he be Guilty of ſuch a Crime as deſerves ſuch a Puniſhment. So that, I take it, the Queſtion now is, Whether Sir *John Fenwick* hath had that Notice to produce his Evidence as is convenient? For I think we ſhould loſe time to let Counſel ramble upon the Reaſonableneſs of our Proceedings; the Queſtion is, Whether he is Guilty of the Fact? Sir, I can never think the Counſel could underſtand your Order, when it ſays to make his Defence, but it muſt be to the Fact upon which he is to be condemned. You have already determined the Point, as to his Prevaricating, but that is not the Matter that ſhall make me find him Guilty: but the Evidence that will weigh with me is the Evidence of High-Treaſon, and how far they can anſwer it.

Mr. *Hooper.* The Queſtion is, Whether or no there be a ſufficient Guilt laid to this Man's Charge? For in all Courts of Judicature this is a certain Rule, You muſt proceed *Secundum Allegata & Probata*; and you ſhall not go about to prove a Thing unleſs it be alledged. Now the Queſtion is, Whether this Thing be

be alledged in the whole Bill, That Sir *John Fenwick* is guilty of High-Treaſon? And if not, whether they ſhall prove what is not alledged? 'Tis true, it hath been alledged that a Bill hath been found; but ſeveral have been Indicted who have been Acquitted. It is poſſible the Priſoner at the Bar may be Guilty; but I think we muſt obſerve that Method here, that is obſerved every where elſe, and that is not to go about to prove any thing that is not alledged.

Mr. *Clarke.* The Learned Gentleman hath made an Objection that perhaps would hold very well in *Weſtminſter* Hall: But I ſuppoſe he may remember this Bill muſt have a ſecond Reading before you, as a Houſe; and there may be Allegations different from what they are now. But the principal Matter before you is, Whether this Gentleman be Guilty of High-Treaſon, or no? And if they did not prepare to that part, I think they were negligent to their Client; for it appears to be that part that is like moſt ſenſibly to affect him.

Mr. *Howe.* The more I hear the Matter debated, the more it ſeems ſtrange to me. I have heard the Bill read, and took notice of the Heads of it: I always underſtood the Preamble of the Bill to be the Inducement to the End of it; I was mightily ſurprized to hear the Kings Counſel took no notice of any part of it, I think they did not ſpeak materially to one Point of the Allegations in the Bill, ſo that the Allegations do ſignify nothing: If they intend the Allegations ſhould ſignify any thing, they ought ſure to be fully proved before we paſs our Judgments upon the Bill. The Counſel, inſtead of endeavouring to prove him Guilty of High-Treaſon, have applied themſelves only to prove that he was Indicted for High-Treaſon, and have been ſo far from proving that he hath prevaricated, that they ſay not one Word of it. Inſtead of Proving that he has forged Papers, in order to alienate the Minds of the King's Subjects, they ſay nothing of that neither, tho' in the Bill theſe are recited

as

as Motives, for paſſing of it. Whatever is laid down in the Bill, as a charge againſt him, ought to be proved, or how can we Anſwer paſſing the Bill. No proceeding can be juſtifiable, if the Fact upon which it is grounded, is any way ſuſpicious or doubtful: ſo that I hope the King's Councel will go on, to prove the Allegations of the Bill, or the Houſe to deny both them and it.

I ſhall no more give my Vote to Hang him, becauſe he is Indicted of High-Treaſon, than I ſhall becauſe he hath been in *Newgate*.

Mr. *Sloane*. I think a great deal of your time in debating this Matter may be ſaved; though I will allow the Bill might have been drawn better, and that a bare Indictment is not a ſufficient Ground of it ſelf for a final Deciſion of this Matter: But when at the time of the finding the Indictment there was two Witneſſes, and one of them is withdrawn, and is ſuppoſed by his means; if the Bill ſeems imperfect, for any thing before you now, you will not ſtay all the Proceedings upon it; but if you ſee it imperfect, and it may be amended, you will amend it at the Committee. I think the Favour you have given is abuſed, and that 'tis perfect trifling from the Bar. In one Breath they ſay, They could not get ready, for they had no Notice till laſt Night; and in the next place they ſay, They will go on to every thing but his being Guilty; and I believe they never will be prepared for that.

Mr. *Attorney General*. Sir, I am very unwilling to ſpeak any thing in this Matter; becauſe, Sir, by the Place I have the Honour to ſerve his Majeſty in, as one of his Councel, if it was in the Courts below, I muſt proſecute on behalf of the King: But I am very ſenſible while I am in this Houſe, I am in another Capacity; I am to Vote here as a Judge, and not as a Party.

That which I do now trouble you about, is in relation to the Matter that hath been Objected; That the

the Bill does not expreſly affirm, that Sir *John Fenwick* was Guilty of High-Treaſon, but only that he was Indicted for it: Truly I thought, and do ſtill, with humble Submiſſion to the Houſe, That that Matter of Affirming him to be Guilty of High-Treaſon was not to be inſerted in the Bill; for that will be the Conſequence of your Judgment, and Opinion, upon hearing of the Evidence. The worthy Member that ſpake laſt ſaid, the Bill might be better drawn; I am ſorry we had not his Aſſiſtance in it: But with Submiſſion to his Underſtanding I think that had been too much Preſumption, till you were ſatisfied whether he was Guilty or no. We could only go ſo far as to ſet forth the Facts we knew; as that he was Indicted that we can verifie, and can't take this to be like the Caſe of an Indictment; for there you muſt affirm ſuch and ſuch Things that cannot be altered afterwards: But a Bill in Parliament hath many Steps, you read it ſeveral times, and commit it; ſo that you alter the Suggeſtions of the Bill as the Caſe appears to you to be verified; and if you be of Opinion that he is not Guilty, you will not condemn him becauſe he is Indicted: However that is not immaterial but proper to be ſet forth for a Ground of your Proceedings, That there was a Probability of his being Guilty from that Accuſation. Therefore, Sir, I confeſs, I can't think that thoſe Gentlemen that are Councel for Sir *John Fenwick* could think, that you did intend to proceed otherwiſe than to hear Councel as to the Fact. They could not think that the proof of his being Indicted, would be Ground enough for you to proceed to paſs the Bill: For how could any body think, but you would come to examine the Fact? I can't ſee how they ſhould come to Miſtake unleſs 'twas wilfully.

Mr. *Price*. The Matter now Debated, is, what Method ſhall be followed, or what Evidence ſhall be given upon this Bill, or whether Evidence ſhall be given of any other Matter than is ſuggeſted in the Bill:

Bill; I muſt confeſs, making a falſe ſtep at firſt ſetting out, hath put us out of the way hitherto: For in the Caſe of my Lord *Strafford* Witneſſes were Examined, and he was Adjudged to be Guilty, before there was any Order for a Bill of Attainder. But ſince you are in this way, pray conſider whether the Councel againſt the Bill have gone according to your Order. The Order was, That Councel ſhould be heard to prove the Suggeſtions of the Bill, and the Counſel for Sir *John Fenwick* do not oppoſe that, but the Councel for the Bill open more things than are comprehended in the Suggeſtions of the Bill, for the Suggeſtions are only a Recital, and are no poſitive averment. And though a Bill and an Indictment do very much differ, yet they muſt agree in this, to put a Charge upon the Perſon. If the Preamble is not to any purpoſe, What need they have made any? They might have ſaid only, *Let him be Attainted.* To what purpoſe does Sir *John Fenwick* come to the Bar? If it is to any purpoſe, 'tis to Anſwer the Charge of the Bill. That learned Perſon ſays, the Bill ought not to Suggeſt that he is Guilty till the Matter is proved, then there muſt be an Amendment in that point, and that will make it a new Bill, and then he muſt have another Day to Anſwer that new Charge. But they might as well have ſaid he was Guilty of High-Treaſon, as to ſay in the Enacting part, *that he ſhould be Attainted.* Therefore if the Gentlemen for the Bill, will proceed and prove the Preamble of the Bill, let them. Otherwiſe I deſire there may be another Day for Sir *John Fenwick* to Attend, and let them do all together.

Sir *Chriſtopher Muſgrave.* I think as to that learned Perſon nothing is to be laid to his Charge, for I think they have drawn the Bill purſuant to the Directions. And if they had drawn it otherwiſe, before they had known the Senſe of the Houſe, I think they had been Guilty of a Crime.

That

That which ſeems to be before you, is what was opened by the King's Counſel, and that was to prove the Treaſon. Now, Sir, I would be glad to know of any Perſon, Whether any thing is to be admitted to be proved at your Bar but what is in your Bill? For let us have a little regard to the Proceedings in *Weſtminſter-Hall.* Can any Perſon upon any Indictment of High-Treaſon, offer Evidence of any Treaſon but what is expreſs'd in the Indictment? And I think this is the ſame in effect; for here you draw a Bill of Attainder againſt Sir *John Fenwick*, and in Juſtice you ſend him a Copy of it, and with great Favour too, you allow him Counſel to Defend himſelf. To what? as to the Suggeſtions that are in the Bill. Otherwiſe to what end did you ſend him the Copy of the Bill? Now if you will admit of any thing to be proved but what is in your Bill, I know not of what dangerous Conſequence it may be, for 'tis impoſſible to be prepared for it.

Mr. *Sollicitor General.* If the Counſel againſt the Bill could be any way miſtaken, or think the Bill defective, I am for giving them longer time to make their beſt Defence, but I think neither one nor the other of them true. But your Order was to draw a Bill for Attainting Sir *John Fenwick* of High-Treaſon, and I think if the Bill had gone no farther, but Enacted *that he ſhould be Attainted of High-Treaſon,* we had ſtrictly purſued your Order, for the Preamble is no neceſſary part of the Bill.

A Bill and an Indictment are of quite different Natures; there is a Form for an Indictment, but none Preſcribed for an Act of Parliament.

As to the Preamble, the Debate when it was Ordered went no farther than that he was Accuſed of High-Treaſon, and was like to have been brought to his Tryal, and to delay it he pretended to make an ingenuous Confeſſion, and inſtead of that, there was produced a Paper which you have cenſured (as you thought fit) and upon that you voted a Bill to be

brought

brought in to Attaint him of High Treaſon; what then could be expected more for the Inducement, but the Debate upon which it was Ordered.

If the Houſe had thought fit to Examine Witneſſes before, (as now) no doubt but the Bill ſhould have Suggeſted that he was Guilty of High-Treaſon; but 'tis time enough for you to Suggeſt that, after you have heard what the Witneſſes ſhall ſay. If the Counſel did not know this, notwithſtanding all that I have ſaid, I am for giving them time, but (with Submiſſion) it was impoſſible for them to miſtake it. If the Bill had went no farther than, Be it Enacted, *that he ſhould be Attainted of High Treaſon*, then they had ſome colour to ſay there were different Species of High Treaſon, and they could not tell to what particular Facts they ſhould apply themſelves. But when the *Indictment* is Recited, which charges him with particular Facts, and tells him by what Witneſſes the Bill was found, it was impoſſible for the Counſel not to know that the Treaſon in the Indictment was the High Treaſon you did intend to Enact that he ſhould be Attainted for, but when they ſay they are not ready, truly there may be ſome reaſon for it, for I believe they never will be ready. Sometimes Men will be wilfully miſtaken, and ſometimes 'tis their misfortune to be ſo. They ſay they are miſtaken, which of theſe are true I know not. But we have ſeen already the time when he hath trifled with the Courts of Juſtice, he hath delay'd his Tryal till one witneſs is withdrawn; if you give him longer time, he may have the good fortune to have the other gone too; I ſee no reaſon for you to forbear hearing of the Evidence,

Mr. *James Mountague*. I am not ſurpriz'd to hear Sir *John Fenwick* deſire time, for giving him time is giving him life; nor for his Counſel to tell you his Witneſſes are not ready; 'tis a common excuſe. I hardly ever knew a Perſon brought upon his Tryal, but that was his Excuſe; and yet I have ſeldom

known it allow'd as a good excuſe: But 'tis objected, you muſt go *ſecundum allegata & probata*, and nothing being in this Bill like what the Counſel for the Bill did open, 'tis not fit to hear Witneſſes to what is not alledged in the Bill. I grant that; and yet I think the counſel ought to be allowed to call Witneſſes to prove every thing they have opened to you: 'Tis agreed they ought not to have brought in a Bill to ſay in point blank terms, he is Guilty of High Treaſon; but then ſay they, you ſhould have Charged in the Bill what Treaſon he is Accuſed of, and then they ſhould have been admitted to prove it. With Submiſſion, the Bill does that thing; for the Bill does Recite, *that he is Indicted of High Treaſon in Compaſſing, &c.* 'Tis plain then the very Treaſon that is Charged upon him by the Indictment is ſpecified in this very Bill: And ſure you will permit them to prove what is alledged in the Bill. Now What did the Counſel for the Bill open? That at ſeveral Meetings they met to Conſult of the Matter, that this Bill takes notice of: Did not the Councel tell you when *Charnock* went there for that purpoſe, and when *Charnock* met them again for their further Aſſurance? Now this being ſo plainly ſet forth in the Bill here, which Recites that this Matter was proved by two Witneſſes, upon the Credit of whoſe Teſtimony his Indictment was found, and that one of them is gone away; and all they ſay now is we are ready to prove the matter then Sworn: is not that proper to ſatisfie Gentlemens Conſciences that won't Convict this Man without Evidence?

Sir *Francis Wninington.* Mr Speaker, I humbly conceive the Queſtion is not now, Whether Sir *John Fenwick* is Guilty or not, But, Whether the Objections the Councel for him have made, be ſo ſtrong as you will grant what they move to you? They tell you if Councel will proceed upon nothing but what is Suggeſted in the Bill, according to your Order, they are ready to make their Defence. It was ſaid the King's Councel

Councel was Ordered to give their Evidence, that can have no Interpretation but as to the Matters in the Bill.

Say the King's Councel, We will prove him Guilty; ſay the Councel on the other ſide, I hope the Houſe will give us time to Encounter them in that, for you have no ſuch thing in the Bill. The ſending them the Copy of the Bill was as much as to ſay, you need not prove any thing but what is therein aſſerted. 'Twas ſaid by the learned Gentleman there, that there might have been an Act of Parliament which might have ſaid only, *Be it Enacted*, That ſuch a Man be Attainted, without giving any Reaſon. I cannot deny but it might be ſo without any Reaſon, but I don't believe it will be ſo. And another learned Perſon was for mending of the Bill; ſays he, when you have the Matter of Fact proved before you, it may lead you to the amending of the Bill, and Inſerting what you pleaſe, and Enacting of it: but does that Anſwer what the councel ſaid on the other ſide? Would you have us Anſwer what we did not know that you would ſtand upon? The Queſtion is not, Whether he be Guilty or no? But whether the Objections that are made be good to give them time?

Col. *Granvill.* Sir, the Councel (by what I obſerved from them) have ſtarted two Difficulties, and really (to me) both ſeem very material; the firſt is, Whether the King's Councel ſhall be at liberty to prove any thing that is not ſuggeſted in the Bill: The other is, whether Sir *John Fenwick* had due notice to make his Defence.

The firſt is a Matter of very great Moment. You are proceeding upon a Bill where not only the Life of Sir *John Fenwick*, but the Life of every Man in *England* is in ſome meaſure concerned. When a Precedent is made in this Caſe, no body knows who may be affected or hurt by it, and therefore I deſire you will ſettle that Matter, and have the Judgment of the Houſe, whether they will admit the Councel to prove

any thing that is not ſuggeſted in the Bill; if you will, I do not ſee how any Man that ſtands at the Bar of your Houſe, can be prepared to make his Defence. For there ſhall be one Crime alledged in the Bill, and when he comes to the Bar, the Councel that are to Proſecute, ſhall go quite off from that which is laid in the Bill, and produce you Evidence to a new Crime. Sir, you had as good allow him no Councel, or Copy of the Bill which you thought ſo neceſſary for every Man that was to come upon his Tryal for his Life for Treaſon, That you altered that Tryal, and declared no Man ſhould have any Treaſon proved againſt him that is not alledged againſt him in the Indictment.

We have had great Complaints of *Weſtminſter* Hall upon this Subject, and if the Parliament ſhould proceed in this manner, may have the ſame again. If we are too raſh in our proceedings, they will be countenanced mightily in them, if you ſhould proceed againſt a Man, and Condemn him for one thing when he is Accuſed of another; I deſire to know, how we can Proceed on a Bill upon which Sir *John Fenwick* is to be proved Guilty, and he hath no opportunity to Anſwer to it; I take it, as this Bill is drawn, Sir *John Fenwick's* Guilt is no way concern'd in it: for whereas the worthy Gentleman tells you the Treaſon is ſpecify'd, there is no Treaſon ſpecify'd otherwiſe than that he is Indicted for it.

Mr *George Rodney Bridges.* Sir, I think the proper Queſtion before you is, Whether you will allow Sir *John Fenwick* time to produce ſuch Witneſſes as he ſhall deſire for his Juſtification? 'Tis a little ſtrange to me, that the Gentlemen that are of Sir *John Fenwick's* Councel, ſhould inſiſt upon farther time for his Preparation, when (I think) 'tis very plain, they were told what they were to prepare for by the Bill, which was, They were to juſtifie Sir *John Fenwick* againſt thoſe things he ſtands Indicted for; and the Matter of the Indictment is the thing to be proved before you

you and the Witneſſes to make it good, are likewiſe mentioned; one of them is gone, but his Teſtimony remains upon Oath, not only to the Grand-Jury, but in another place, I do not think you will think it reaſonable, after the King's Councel have made out their Evidence, to give Sir *John Fenwick* time to make obſervations upon the Charge; ſo you will conſider before you hear the King's Councel, whether you will allow him farther time, or no.

Sir Joſ. Williamſon. *Mr. Speaker*, The Gentleman that ſpoke laſt, ſtates the Caſe to be, Whether you will think it reaſonable to allow Sir *John Fenwick* farther time to produce his Witneſſes? You may, Sir, make that the Queſtion; but that will depend upon another, which is, Whether you think that Sir *John Fenwick* had not notice enough to prepare to defend himſelf againſt the Charge contained in the Preamble of the Bill? And I add this further, Whether the Manner and Way of expreſſing that particular Charge in the Bill, is not ſo Worded, ſo Charged, as here expreſly to become a Charge that he is to Anſwer; and not only as a Matter of Fact Hiſtorically related, but to come in proof here: For if it proves to be well Charged in the Preamble, 'tis a particular Fact of Treaſon he is to Anſwer for in this Houſe, and then he hath had time enough; ſo that now you are to judge of your own way of expreſſing your ſelves. I believe every Gentleman knows it was the Senſe and Meaning of the Houſe, That thoſe are the particular Treaſons mentioned in the Indictment with which he ſhould be Charged at the Bar, and have time and liberty to Defend himſelf; and not only to the Allegations that he had been Indicted, *&c.* Now, Sir, if you ſhall allow theſe Gentlemen to except againſt your way of expreſſing your ſelves, that I ſubmit to you. But 'tis clear to me, that this was a very good and proper way of expreſſing your ſelves, to Charge him with theſe Facts, and to give him Liberty to diſprove it. If he and his Councel underſtood it other-

wiſe, the Queſtion is, Whether their differing with you in the way of Expreſſing it ſhall be allowed to them, without taking a reaſonable Exception to it? You are tyed here to the ſtrict Rules of Juſtice, but as to the Forms of Proceeding below, I don't think you are. Our Meaning was moſt certain (though he was Indicted, that was nothing to us) That they ſhould bring their Proof to our Bar to prove him Guilty; and if you ſhould give him two or three Days time, 'tis to mend your Bill to their way of Expreſſion, and to their Senſe.

Mr. *Brotherton.* I take the Queſtion to be now, Whether the King's Counſel ſhould give Evidence of any other Matter than what is alledged in the Bill? As to that I muſt obſerve to you, That this Bill does not ſet forth any particular Charge againſt him; it does not ſay, That he ſuch a Day did ſuch a Fact, whereby he can make his Defence, 'tis only the Recital of an Indictment; and it does not ſay the particular Time and Place where the Fact was done. Now as to what that Gentleman ſays, If it had been ſaid Generally, that he ſhould be Attainted it had been ſufficient. 22 *H.* 8. The Statute for Attainting one for putting Poyſon into a Pot, *&c.* there is the Day and Year when the Fact was committed, and ſo he might make his Defence. Then the Kings Councel offer to prove, That this *Goodman* was conveyed away by Sir *John Fenwick*, and there is no ſuch Charge in the Bill; for the Bill only ſays, That he is withdrawn; and I am of Opinion they ought to give Evidence of nothing but what is in the Bill.

Mr. *Whittaker.* As to the Exceptions made by the Councel to the inſufficiency of the Bill, by which they pretend Sir *John Fenwick* was lead into an Error, ſo that he had no due Notice, I muſt needs ſay, If they were in *Weſtminſter* Hall they would be in the Right: But this Houſe is not bound to thoſe Forms; for I believe the Enacting Clauſe would do the Buſineſs of Sir *John Fenwick* well enough, if all the reſt

were

were laid aſide; and yet I will conſider it with as much Tenderneſs and Conſcience for the *Priſoner* at the Bar as any that bring Arguments from *Weſtminſter* Hall. I would conſider, Whether ſuch a Defence as they have made, that from the Bill (as to what is laid in it) he had not Notice enough to prepare to make his Anſwer: They ſay, a Recital is no direct Affirmation. In Civil Matters it is an Affirmation. For to ſay, *Whereas ſuch a one is Bound*, is good in a Declaration upon a Bond. Now I would know, Whether this be not enough to ſay, that he is Indicted without an Allegation that he is Guilty? Had the Bill no recital at all, it had been an Objection; but it may be it had been ſuch an Objection, that they ought to have done ſomething of their Parts, as to have deſired the Opinion of the Houſe to what they ſhould have anſwered: For ſuppoſe there had been no Recital at all (and you may make what Recital you think fit) what ſhould Sir *John Fenwick* have done? There are ſome Caſes where the Common Law does allow a general Charge; A Man is indicted for being a common *Barretor*, and there are no Inſtances given in the Indictment; why then he comes and prays the Court, that they may declare what Inſtances they will go upon and that they may give no other in Evidence: Therefore I queſtion not but that ſhould have come on his part. He is to be heard as to the Enacting part of the Bill. Now if they do offer to give Evidence of any Treaſon that is not ſpecified in the Recital of the Bill, and the Councel make an Objection to it, I ſhall agree with them.

Sir *Ed. Seymour.* Mr. *Speaker*, what hath been ſaid to you by that worthy Perſon that ſpoke laſt, no doubt is true; That if there had been no more than the Enacting Clauſe, it would have done Sir *John Fenwick*'s Buſineſs with a Witneſs, or rather without a Witneſs: But that is not the Queſtion we are diſ-

putting here; but the Queſtion is, Whether you will give Sir *John Fenwick* longer time to make his Defence to that part he inſiſts on, that is not contained in the Bill. We are all ſatisfied I ſuppoſe that we can't go through with the Suggeſtions to Night, and the Debates, and what relates to it; and I find no Perſon againſt putting it off, but becauſe it would be a delay, and if it be no delay that Reaſon is out of Doors.

Paſt Three a Clock.

They tell you the Councel could not but take Notice of the Matters ſuggeſted in the Indictment: I cannot think that is reaſonably argued; becauſe they do know the Practice and Method is ſuch, That they can take Notice of nothing but what is ſpecified and contained in the Bill. And therefore there being no Guilt charged upon Sir *John Fenwick* in the Bill, Is it reaſonable they ſhould come and accuſe themſelves here, or make a Defence to what is not Charged? No; but, ſay they, It is implied. This is an untrodden Path, and you ought to walk as ſecurely in it as you can. 'Tis Extraordinary that you bring Sir *John Fenwick* here to anſwer for Treaſon, when 'tis allowed in the Suggeſtions of the Bill; you have but one Witneſs to that Treaſon, but when you take theſe extraordinary Steps, you ſhould comply with him as much as you can in the Forms. For if Treaſon be not Treaſon unleſs it be proved by two Witneſſes, I hope that you will give him time to make his Defence, and I think it no loſs of Time (for you can't go through the Bill to Night) to take another Day to ſee whether Sir *John Fenwick* be guilty of what is contained in the Indictment. And I will give you one Reaſon why he could not be prepared to make his Defence in ſo ſhort a Time, for he had no Order for the Witneſſes if he had any; and if you give him longer time, I ſuppoſe you will think fit that Sir *John Fenwick* ſhould give an Account of what Witneſſes he ſhall make uſe of for his Defence, and you will give an Order for thoſe Witneſſes.

Mr. *Harcourt.*

Mr. *Harcourt.* If Sir *John Fenwick*'s Buſineſs muſt be done, I hope we ſhall do it like rational Men, and what ever we Enact be able to give a reaſonable Account of it.

As to the Queſtion propoſed, your Debates have ran ſeveral ways: The firſt is, Whether Sir *John Fenwick* ſhall be allowed further Time? And in this Caſe, whoever I differ with, 'tis of that Nature that I muſt deſire the Liberty of ſpeaking my mind. I muſt confeſs I ſee no Reaſon for inlarging the Time, and I ſhall humbly ſubmit my Opinion to other Gentlemen, whether he ſhould have further Time to prepare his Witneſſes: And for that, pray conſider the Nature of the Matter before you.

Sir, there is nothing certain that is alledged in the Bill; and ſhould you allow him further time, to anſwer that which is not alledged, I can't imagine what Effect you would have of it. 'Tis ſaid indeed, he ſtands Indicted; but 'tis no were ſuggeſted, that he is Guilty of that Indictment. Such a general Charge has always ſeem'd a great Hardſhip: There is no one Thing that ſo many Perſons have been unjuſtly taken off by, as by the alledging general Facts in Indictments of High Treaſon, in ſuch an uncertain manner, that the parties accuſed know not what they were to Anſwer to; nor has any thing been complained of in ſuch Tryals for a greater Grievance. What have you done in the Bill for regulating of Tryals in Caſes of High Treaſon? In that Bill you have reformed that Abuſe, and taken care, That what ever Treaſon a Man might be Guitly of, yet he ſhall never upon his Indictment, anſwer to any Fact, unleſs the particular Overt-Act be expreſly laid and affirmed in his Indictment. By the ſame reaſon in my opinion.

That which ſeems moſt reaſonable in this Caſe to be done is not to inlarge the time; but when you think fitting to proceed, proceed upon what is before you. There are ſome Matters expreſly alledged; let them go over the Recital, ſee whether they can prove

that

that; but I can't imagine to what purpoſe you ſhould give the Priſoner further time to anſwer nothing, for that which is not Charged is ſo.

Mr. *Finch.* Mr. *Speaker,* Sir, this is a Queſtion in my Opinion of very great Conſequence: You are very well told from below, That this is an untrodden Path, and I am the more confirmed 'tis ſo from this Debate.

We are told, That Sir *John Fenwick,* or his Councel, could not be ignorant of what they were to prepare themſelves for, For this was our meaning, ſays one Gentleman, Though I find the Path is ſo untrod we are very unfortunate in expreſſing of it; for we have not ſaid it at all in this Bill. We have ſaid, Sir *John Fenwick* was Indicted, *&c.* Sir *John Fenwick* hath had a Copy of this Bill ſent him, Councel allowed him, and upon a ſecond Reading he comes to make his Defence. We are told, The Proceedings upon this Bill are not to be reſembled to the Proceeding in *Weſtminſter* Hall, and this is ſufficient in a Bill (though in an Indictment it would not) without alledging that Sir *John Fenwick* is Guilty. But one would think that every Allegation in the Bill, that is, the Inducement to the Bill which is for Attaintiug of him, ſhould be a good and juſt Ground for the Attainder; and then this Gentleman that hath had a Copy of the Bill to prepare for his Defence, and ſhew you Reaſons why the Bill ſhould not Paſs, though our Proceedings are not to be reſembled to the ordinary Proceedings, yet we are to expect from him ſuch a Defence as the ordinary Proceedings in *Weſtminſter* Hall would require: But I think this is hardly to be expected, One might have thought, and reaſonably enough, That it might have come into his Imagination, that if there had been Ground to Attaint him, by the ordinary Proceedings and Methods of Juſtice, the Parliament would not have taken an extraordiuary Courſe to come at it: For I can never think it a good Reaſon to proceed this way, that 'tis, for the ſaving of time; and if there be an extraordi-

nary

nary reaſon, they muſt gueſs at it out of the Bill; Now the Bill is grounded upon thoſe Suggeſtions that I have Cited; and then I ſhould have imagined, That whereas he had been Indicted upon the Oaths of two Witneſſes, as the Law requires, and one of them was withdrawn, that you had rather intended to have Charged him with ſome Contrivance to elude Juſtice, whereby you had reaſon to Exert your extraordinary Authority to proceed againſt him by way of the Legiſlature. And I doe not find we have any Precedent to warrant this Proceeding, though in our Debates we have endeavoured to find one. And I can't but obſerve the Conſequence of this hereafter: For whether we can find a precedent to warrant this Proceeding in former Ages, we are making a Precedent for our Poſterity. And conſider the Conſequence of this Precedent you are making; I think all the Bills in Parliament are guarded by the moſt ſerious ways of Deliberation, before you come to Judgment: And Bills of Attainder doe much more (ſure) require the ſeriouſneſs of your Debates. But I can't but obſerve the ſteps now made. I am afraid there was a wrong ſtep at firſt. I was not here the firſt Day: But I recollect ſome things from the Bill it ſelf and the tenderneſs of thoſe things upon which this Enacting Clauſe does ſtand. Here was no Evidence given to induce the Houſe to bring in this Bill of Attainder. When this Bill is brought in, and the whole Preamble, that ſuggeſts that which is the ground of the Enacting part conſidered in the Houſe, and ſome Gentlemen did not think it reaſonable to proceed to the Reading of it a ſecond time, I remember we were told, Won t you Read it a ſecond time, when you may have an opportunity of having thoſe ſuggeſtions proved to you? This was the ground why this Bill ſhould be Read a ſecond time. For conſider, otherwiſe a Gentleman may in any other Caſe as well as this, deſire leave to bring in a Bill for Attainting ſuch a one, and tell you, you ſhall have good Reaſon given to

you

you for it afterwards; and though the Reaſons ſuggeſted in the Bill, are not ſufficient, you may have Reaſons out of the Bill that are ſufficient. What a Precedent will this be? Why, Sir, length of time gives a Sanction to thoſe Precedents which the Age that made them thinks not of; and they become good Examples to Poſterity, that were even very heinous Precedents to the preſent times. Now if this ſhall ſtand, as now in the Bill, I would ask what Man in *England* is ſecure when a Parliament ſhall ariſe that hath a mind to Attaint him? Why then, Sir, if you do amend the Bill, conſider the Method of your Proceedings. You do your ſelves, in effect Declare, That for bringing in of the Bill, for twice Reading of the Bill you had no ground at all; for otherwiſe you had good grounds Recited in the Bill, and that muſt be a ſufficient ground to Attaint him; and if you Declare it no ſufficient ground to Attaint him, you Declare you have brought in a Bill, and Read it twice, without any ground. Whether you will allow liberty to offer at your Bar any Suggeſtions otherwiſe than in the Bill, that I muſt ſubmit to you, and ſo for giving time, ſince that is a Queſtion of a very extraordinary nature. But I have humbly offered my Thoughts, as to that Queſtion, Whether any thing ſhall be offered otherwiſe than is ſuggeſted in the Preamble of the Bill? I hope, you will not for the Precedent ſake you are now making, which if you do, I am afraid Bills of Attainder may be now as frequent as Bills of Attainder were in *Richard* the II's. time, which I hope never ſhall be.

Lord Norreys. Mr. Speaker, I will not pretend to tell you that you are bound by other Rules than Rules of Juſtice; but what is Juſtice in *Weſtminſter* Hall, is ſo here, and every where. And laſt Year you thought it Juſtice that no Man ſhould be brought to a Tryal, but he ſhould know what were the particular Facts that were alledged againſt him.

Lord

Lord Cutts. I think it, in ſome meaſure, a Misfortune, That a Matter of this nature, as is your preſent Debate, hath held you ſo long; and conceive it a thing to be wiſhed, That every Gentleman that ſpeaks upon this occaſion, would apply himſelf more cloſely to ſubſtance, and leſs to Forms, I mean to Forms conſidered meerly as Forms, for it ought to be true Reaſon that is convincing to you: And you ought not to tye your ſelves to any Forms upon this occaſion, but ſuch as are grounded upon Reaſon; and really I have not heard any thing that fell from any Gemtleman that ſhews his doubt of the nature and aggravating Circumſtances of the Crime of the Priſoner: But it hath conſiſted with the great Candour and Juſtice of this Houſe, to ſhew this Favour to the Priſoner before you. The Councel ſay, they are unprepared; if they mean they would prepare themſelves for more grounds of Difference and *Chicanry*, I would not give them farther time; I can't perceive there is any reality of Argument in it, and there is in Reaſoning, as in Religion, ſometimes a Form without a Power.

Sir *Thomas Dyke.* Sir, you have now two or three Queſtions before you. I deſire you will confine our Debates to one point; I think whatever Opinion Gentlemen may be of concerning the Proof, the Point under your Conſideration, if you will make a right Judgment, is the Preamble of your Bill, which I take to be the Foundation of it, and the Cauſe for which you Attaint this Gentleman. Now if the Preamble does not recite, and ſay, he is Guilty, but only Indicted, nor ſet forth any time; nay it does not ſay he was Arraigned, theſe things are very uncertain, and yet you muſt Attaint him for the things recited in your Bill. You know theſe Acts of Attainder are extraordinary Methods in Caſes of Treaſon; and if you put it upon this Point, That the Act Attaints him for one thing, and the Councel ſhall prove another, it makes it more uncertain than it is, and no

Man

Man can be ſafe. Therefore I hope you will confine the Counſel to the Proofs of the Matter contained in the Bill.

Mr. John Howe. Sir, I ſhall not move you to any thing that may tend to a delay of the Matter before you. I think, if you pleaſe to go on upon what is ſuggeſted in the Bill, they are Allegations which muſt be proved before the Bill is Committed, (and will not hinder Sir *John Fenwick* from being Examined to the Treaſon likewiſe.) Therefore all that is alledged in this Bill, (I ſuppoſe) being thought neceſſary to be proved, I deſire he may be called in, and the Councel may go on to prove what is alledged in the Bill, and afterwards Sir *John Fenwick* may Anſwer them.

Lord Coningsby. If the Queſtion was, Whether you ſhould grant this Gentleman time or no to make his Defence, I ſhould not have troubled you? But the Queſtion now ſeems to be, Whether the Bill does depend upon the bare Suggeſtions of the Bill, or upon the Guilt of Sir *John Fenwick*? And therefore if Gentlemen do inſiſt upon it that he ſhould have longer time to defend himſelf, as to his being Innocent or Guilty, I ſhall not oppoſe it; but if you think fit to put it off, as if the Fate of the Bill did depend upon the Suggeſtions of it, I can't agree to that. Therefore I deſire a ſhort time may be given him to Anſwer the Matter of his Guilt.

Mr. Harley. I find all Gentlemen that ſpeak of this Subject, do ſay this Matter is of a very extraordinary Nature, and you have entered into it by very extraordinary Methods: But I muſt only obſerve, That this being the firſt Bill of this kind that hath been brought into the Houſe, before any Proof, Gentlemen, muſt be excuſed if they are Cautious what ſteps they do take; and when the Wiſdom of the Houſe have thought fit to take quite different Methods, as to the Preliminaries, 'tis not to be wondered if they meet with difficulties in their Proceedings.

Some

Some Gentlemen preſs for more Time to be given to Sir *John Fenwick* to be prepared; and others urge, that you ſhould declare, Whether the Councel ſhould be heard to any thing, but what is ſuggeſted in the Bill, and I think you muſt give a Determination to that Queſtion firſt, though, the whole Houſe agreed to give him longer Time: For if you give him longer Time, it will after come to the ſame Debate, Whether they ſhall be heard to any Thing but what is ſuggeſted in the Bill? If you ſhould think fit to add any Thing to the Bill, then it will be reaſonable that he alſo ſhould be heard to that; for in the Caſe of the Death of a Man, let him deſerve never ſo much, yet he does not deſerve to dye unjuſtly by your hands.

It ſeems a very plain Propoſition, That when a Man is accuſed, he ſhould not anſwer to what he is not Charged with; and to charge it with *Inuendo's* and *Implications* is ſo uncertain, that as I always have ſeen it condemned in this Houſe, ſo I hope I ſhall not ſee ſo great an Aſſembly give any Countenance to it. They did tell you, they were prepared to ſpeak to the Reaſonableneſs of the Bill; but this Matter not being ſuggeſted in the Bill, they arenot prepared to ſpeak to it.

Sir *Tho. Littleton.* I ſee now where your Debates have lead you. I thought the Regular Subject of our Debates had been the Point upon which the Councel withdrew, and that was for Time. For what? Why to prepare themſelves to Anſwer any Evidence that might be given againſt them, becauſe they perceived you did expect the Councel for the Bill ſhould produce their Evidence. But they made an Objection; ſay they, We did not underſtand your Order was, that we ſhould come prepared to oppoſe any Teſtimony *Vivâ Voce* to be given againſt us, but only prepared to ſpeak to the Reaſonableneſs of the Bill. Now, ſome Gentlemen, after Five or Six Hours Debate, have been willing to accomodate the Matter (that no Body might think that any one preſſed a

Matter

Matter unreaſonable) that they might have Time, But others will not be ſatisfied with granting what the Counſel deſired, but they deſire more. And what is that? Why, that is to know the Opinion of the Houſe, whether you will admit any one Thing to be proved that is not ſuggeſted in the Bill? and I do take this to be within the Suggeſtions of the Bill as fully as can be expreſſed. For what does the Bill ſay? The Bill does ſay, he was Indicted of High Treaſon, and that one of the Witneſſes is gone. And Gentlemen, come to the Concluſion, and skip over the intermediate part of the Bill, for the Bill does ſay, That he did meet and Conſult, *&c.* And the Objection of the Counſel was not againſt the Evidence but they ſaid, They were not prepared at that Time to anſwer it, and there they leave it; and thereupon the Houſe go upon the Debate. What can we expect that they intended? They might think, either we ſhall gain our Point, and the Houſe will give us Time; or otherwiſe, if they go on, and hear this Evidence, then we may ſay we wanted Time. And ſo it will be only Evidence *ex Parte*, and not carry ſo much weight with it, though we have nothing to ſay to it. Or they might think it may have this Effect, That the Houſe will not go on, and hear any Evidence at all and that in either of theſe Caſes, they have the faireſt Advantage that they can have, on the Second Reading of the Bill, in defence of their Client. All they deſired was, That they might have Time and I hope that which will ſatisfie them that are moſt concerned, may ſatisfy any Gentleman of the Houſe.

Mr. *J. Howe.* The Queſtion is not, What they asked, but what is Reaſonable for us to grant? I muſt inſiſt, Sir, That the King's Councel may be deſired to prove the Suggeſtions of the Bill.

Mr. *Sol. Gen.* Moſt that have ſpoke of this Matter have ſaid, That the Matter is very generally laid in this Bill, and the Counſel could not very well

know to what to apply themſelves: That it ſpeaks of *High Treaſon* in general, and of Aiding the King's Enemies, which is very General: It recites that indeed, but the *Indictment* is Legal, according to the late Act of Parliament. 'Tis not only ſaid, That he deſigned the Death of the King, but for that purpoſe, he, and others, met together and agreed to ſend *Charnock* to *France*, to go to King *James*, to induce the *French* King with an Armed Power to invade *England*. Now how can any thing be more particularly Charged? And the *Indictment* is ſo Charged in your *Bill*. I think therefore the Councel could not be ignorant to what they ought to apply themſelves. But by what I perceive, ſome Gentlemen are verywell contented to give him further Time. I remember, when the *Bill* was brought in, there was a long Debate for a Second Reading, and ſome Gentlemen thought it hard to be tryed by ſo great an Aſſembly, and ſaid, They had rather be tryed by a fewer Number: But I ſhall obſerve, That you have ſent the Copy of the Bill to Sir *John Fenwick* before hand, and you ſent him Notice that he ſhould provide himſelf. I remember a much better Man than Sir *John Fenwick*, who had the Misfortune to be under an Accuſation of High Treaſon, had his *Indictment* read to him one Hour, and was tryed the next, and though he deſired to have his Tryal put off till the Afternoon, he could not prevail with that Court of Juſtice to do it. Sir *John Fenwick* hath had a Copy of his Bill for Two or Three Days, but the other never had any copy of his *Indictment* till he had pleaded.

Mr. *Waller*. I ſtand up only for my information; that which I would know is, Whether the Councel did not ask you the Queſtion, whether they ſhould be bound to anſwer any Thing that is not in the Bill? If they asked that, then the Gentleman that ſpake here is anſwered; and the Gentlemen of the Houſe do not inſiſt upon what Sir *John Fenwick's* Councel did not inſiſt on. And I do think the King's Ser-

geant, who opened the Proceedings, after he had opened what had been before the Grand-Jury, ſeemed to make it a Charge, as if Sir *John Fenwick* had been condeſcending to the withdrawing of *Goodman*. Now that ſeemed, as if they deſigned to make that a Part of the Evidence.

Sir *Richard Temple*. The Councel did not inſiſt upon it only to anſwer the Suggeſtions of the Bill: Every Body knows, they Objected to the others going on with the Evidence they opened, becauſe it was not in the Bill; and the King's Counſel could not ſo much as alledge, That it was in the Bill; and they would have gone on to have proved the Indictment. There is another Thing: It is told you as if the Preamble had ſuggeſted ſomething of this kind, That there was a Meeting. Now that Gentleman that ſpake laſt, but one, has cleared it, That it only recites he was Indicted for theſe Things, and this brings nothing in Iſſue, whether he be Guilty, or no? Now, I think, the preſent Queſtion, and only Queſtion before you, is upon the Suggeſtions of the Bill; for you can bring nothing in Iſſue here, but what is in the Bill; and no Body can inſiſt by the Rules of Reaſon or Juſtice, That any Man ſhould be heard to any Matter of Fact but what is in the Bill. And therefore I think there is nothing before you, but that you ſhould give Direction to hear them to what is ſuggeſted in the Bill.

Mr. *Methwen*. Sir, I ſpeak to the Method of your Debates, which ariſe upon an Objection that was made by Sir *John Fenwick*'s Counſel againſt the Councel for the Bill's going on, with their Evidence to prove Sir *John Fenwick* guilty of High Treaſon.

I muſt beg leave to differ as to what the Councel did ſay; for ſome of the Gentlemen that ſpake laſt, the force of their Objections was, That they ſhould not now go on, for they were not prepared to Anſwer them; and the Reaſon they gave was, That they

they had not formal notice; And one of them afterwards ſpake to the ſhortneſs of the time. Your Debates for a long time went purſuant to this, Whether you ſhould allow them further time or no? But the length of your Debates have raiſed a new Matter. And I think that Doubt, though it was not made by the Councel, may be very properly made by any Worthy Member that hath that doubt, Whether as the Bill is brought in, the King's Councel might at any time ſpeak to that Point, though *Sir John Fenwick* be not acquainted with it? And I muſt always agree that Doubt ought to be reſolved, before you come to reſolve whether further time ſhall be allowed to him or and therefore I propoſe it, that this Queſtion may be put, Whether the Houſe will hear, at the Bar of the Houſe, the Evidence there is to prove Sir *John Fenwick* Guilty of the High Treaſon whereof he was Indicted?

Col. Wharton. You have three or four Queſtions upon your Paper; and now after ſo long a Debate as we have had, I hope Gentlemen, will not think fit to ſtart new ones; and I hope you will take care that Gentlemen ſhall not riſe up three or four times to ſpeak to this Matter. You have another Rule of the Houſe, That when a Queſtion is moved, and ſeconded, though another Queſtion is moved afterwards, yet that muſt be the firſt Queſtion that is to be put, and I hope you will keep us to theſe Rules.

I wonder at ſome Objections. 'Tis told you, That this is ſuch a Proceeding that never any thing of this kind was before; and that you are here going to Read a Bill of Attainder before you have had any manner of Evidence, upon which you ſhould ground the bringing in of this Bill. Gentlemen muſt remember, or ſhould have informed themſelves; for 'tis very certain that you had very good Grounds to Vote this Bill to be brought in: I ſee the Gentleman that brought in his own accuſation; you had his own Diſcovery Read, and Mr. Attorney did inform you

what was againſt him, and how he ſtood Indicted. And another Gentleman by me told you, he was with him, and there was a Treaty for his Pardon; this was Evidence for reaſonable Men to go upon: And to tell you that theſe Precedents would endanger your Liberty. Under favour, this is the ground of all your Liberty. 'Tis by this Power of Proceeding, when you have not that Evidence that *Weſtminſter* Hall requires, by which you will keep Great Men in Awe.

Now give me leave to ſpeak to the Queſtion that I think you ought to put; 'Tis told you, by the Councel for the Priſoner, That they are not Appriſed what the Senſe of the Houſe was, and upon that Account they deſired further time: I confeſs, when you allowed Councel, I was of Opinion it was a favour; and now ſince they have made this Objection, though I do not believe you are obliged to allow them further time; yet I had rather Err on that than the other ſide; and therefore I think the faireſt thing is to allow them ſome further time.

Mr. *Secretary Trumbull.* Mr. Speaker, I have attended all this Day to your Debates, which are now in my Opinion of a very Extraordinary nature; for a great deal of your time hath been ſpent upon Motion of the Councel for the Priſoner at the Bar, whether you ſhould allow them further time or no: And now, by what I recollect from the Senſe of ſeveral Gentlemen, the Houſe ſeems willing to allow them further time; even that is oppoſed at this time of day.

Sir, the King's Councel have opened the Matter of Fact, upon which they did intend to produce their Evidence; and when they had opened the ſeveral Heads, the only Objection that I heard made by the other ſide, was, They did not think the King's Councel could have proceeded to Examine Witneſſes upon thoſe Facts, and that they were not prepared to bring Witneſſes on the ſide of the Priſoner, and therefore prayed for further time; truly, whether

whether that be reaſonable or no, or whether upon one Favour the Houſe think fit to grant another: I can't tell what might be, if it had come to a Queſtion, ſince the Life of a Man is concerned, we ought to be tender of it, and I ſhall be as tender as another; Therefore I am of Opinion, that a reaſonable time ſhould be allowed. To do what? Why, upon the Evidence the King's Councel ſhall produce, they ſhall bring their Witneſſes on the other ſide to Anſwer them: Whether the King's Councel will produce Evidence that is foreign to the Bill, that will be in Judgment of the Houſe; but it was a good Motion made below, which I cloſe withall, That a ſhort time may be allowed them to make their Defence, and bring their Witneſſes.

Mr. *Speaker.* Gentlemen, you have had a long Debate; I don't remember any formal Queſtion that was propoſed at firſt, till ſuch time as I Read to you what I thought was the Queſtion upon the Debate; when I Read you the Queſtion for further time, there were ſeveral Members ſtood up, and ſaid, That was not the Queſtion; and took Exceptions to it, and propoſed that the Councel ſhould be confined to produce Evidence only to the Matters ſuggeſted in the Bill; ſo that now I have two Queſtions upon my Paper, which I will Read to you, and put which you will. One Queſtion is, *That they be confined to make their Proof to what is ſuggeſted in the Bill.* the ſecond Queſtion is *that Sir John Fenwick be allowed further time, &c.*

Sir. Chriſtoph. Muſgrave. A Gentleman ſaid, the ſecond Queſtion upon your Paper was but lately ſtarted; but I remember, a little after the Councel was withdrawn, it was moved, Whether you would give them further time? And I preſently after in the Debate did take the freedom to ask, Whether it was intended they ſhould Anſwer to any thing but what was contained in the Bill? And I remember there was a Gentleman of the long Robe ſaid, That there was

nothing offered by the King's Councel, but what was within the Suggeſtions of the Bill. Another Gentleman ſaid, when they may have longer Time, they did not ſeem ſo fond of it; 'tis indifferent to me, provided he be prepared to Anſwer. But I can't but obſerve, That the Concluſion of that honourable Perſon was, that at laſt you muſt come to determine the Queſtion. You were likewiſe told, by an honourable Perſon nearer the Bar, Why do you Diſpute this, now you have ordered the King's Councel to produce the Evidence, and ſo you have Concluded your ſelves? But for my ſelf, I muſt confeſs I did never think the Evidence was to be heard otherwiſe than as to the Suggeſtions of the Bill. And if that Point be to be determined, Why will not you determine it now, rather than to have another Debate upon it?

Mr. *Boſcawen.* That which is preſſed by ſome Gentlemen, is begging of the Queſtion. What have we here brought Sir *John Fenwick* for? Was it not to ſatisfy our ſelves, whether Sir *John Fenwick* was Guilty of High Treaſon? Now that is ſuppoſed by ſome Gentlemen not to be within the Bill: If it be not within the Bill, I deſire you would throw out the Bill. But the Thing is, we muſt not examine to thoſe Things that will make Sir *John Fenwick* Guilty. Sir, This is a very nice Thing, and very curiouſly woven. The great Thing, ſay ſome Gentlemen, we muſt take care of, is the Blood of a Man? Does any one ſay he is Innocent? No; but we muſt have ſome way or another that he muſt not be brought to his Tryal. I deſire, as *Engliſh* Men, you will not only take Care of the Life of one Man, but of the Life of the King; of the Lives of our Wives and Children, and all our Families. What will they ſay without Doors? You are afraid to meddle with Sir *John Fenwick*; and therefore you will ſlide it a way upon another Point, That his being Guilty of High Treaſon is not within the Bill. I am not for taking the Advantage of Time; I deſire, as it was moved before

fore, That you will give him Time, and try whether he be Guilty of this Treaſon or no, or otherwiſe do nothing in it at all.

Then the Order was made for Candles to be brought in. Which was done.

Sir Tho. Littleton. Now you have Candles brought in, it will be fit for you to return to the Queſtion: For my part I am willing to put both, but I think the laſt Queſtion that you have upon the Paper, properly ſpeaking, is to be put firſt, and that is, That the Houſe will proceed to examine Witneſſes to the Treaſon in the Bill for which he ſtands Indicted.

Mr. J. Howe. I think the Queſtion ought to be, *That his Councel be directed to bring Witneſſes to the Allegations in this Bill.*

Sir Tho. Littleton. I propoſe it to you thus, *That the Houſe will proceed to examine Witneſſes at the Bar, to the Treaſons mentioned in the Bill for which he was Indicted.*

Mr J. Howe. I think that Gentleman might very well have moved the Queſtion without that Limitation; for that is as much as to ſay, That Witneſſes ſhall be examined to none of the Treaſons in the Bill, except thoſe for which he hath been Indicted; and that is a Limitation I hope ſhall not be put to the Enquiries of this Houſe. I hope you will put it, *That they ſhall bring Evidence to the Matters alledged in the Bill,* generally: There are ſeveral Allegations in the Bill of which he was never Indicted which I would have him anſwer to, as the Alienating the Affections of the King's Subjects from him, which I ſuppoſe to be Treaſon.

Members. No, No.

Mr. John. Howe. Why, if it be not High-Treaſon, it hath nothing to do in that Place.

Another Member. Sir, I do not know how the Queſtion may be carried ſince Candles are come in; but I think 'tis for the better. I think there are two Things have been ſpoke to; one is this Bill: I find

thoſe Gentlemen that were againſt the Bill on Friday, are more againſt it now. I was for the Bill then, and am now for a Second Reading of it: I think the Bill is very plain, and know not what they would have mentioned in it more, unleſs they would have had the *King's Head* Tavern, and what Wine they drank there. I think there is all the Reaſon in the World to hear the Witneſſes to prove him Guilty of High Treaſon. As to the Point of Time, I ſhould be very willing to allow it them, if that Queſtion was put; and I think you have been very favourable to him already, in allowing him Councel.

Mr. Smith. I would only obſerve, when the Bill was to be brought in, the Objection was, That you had not Witneſſes. And now the Queſtion is, Whether you can hear Witneſſes upon Facts not particularly aſſigned in the Bill. I believe no Man can ſay, but that in the Indictment there are particular Facts that ought to be Examined: I do own, for my part, if Sir *John Fenwick* was a greater Man than he is, It were better he ſhould Eſcape, than you ſhould ſpend ſo much time about him. Sir, the Indictment is mentioned in the Bill; no Man thinks that *Goodman*'s going away, is Reaſon enough for bringing in ſuch a Bill againſt Sir *John Fenwick*.

Mr. Speaker. Shall I read you the Queſtion,

That Sir John Fenwick *be allowed further Time to produce Witneſſes in his Defence, againſt the Charge of High Treaſon, and that he give in a Liſt of his Witneſſes to the Speaker?*

Which Queſtion was put, and paſſed in the Affirmative.

Mr. Speaker. The other Queſtion is,

That the Councel, who are to produce their Evidence againſt Sir John Fenwick, *be allowed to prove Sir* John Fenwick *Guilty of High Treaſon?*

Sir Tho. Littleton. I do think one of the Reaſons why this Bill was brought, was, Becauſe poſſibly, by

by the Abſence of this Witneſs, he could not, ſtrictly ſpeaking, be proved Guilty; though all Mankind is ſatisfied in his Guilt. And therefore I queſtion whether it will amount to a Legal Proof: And if you had ſuch a Proof as would convict him by the common Proceedings of Law, I ſhould not have been for a Bill of this nature: For 'tis againſt the Honour and Dignity of this Houſe to do the Work that an inferior Court can do. But probably, by the Abſence of this Witneſs, Sir *John Fenwick* at a Tryal in the *Old Baily* might Eſcape, though at the ſame time 'tis highly probable the Witneſs that is wanting to Convict him, is by his means gone out of the way. Therefore I ſpeak to the wording of your Queſtion, you ſay, *Shall be allowed to prove.* I would willingly prevent what may be Objected when we come upon this Debate: if you do uſe the Word *Prove*, they may ſay, this is not Proof; for ſtill *Goodman* is not here. If you pleaſe to ſay, *That we will examin Witneſſes to the Treaſon*, and we will be Judges how far it appears to us, whether he be Guilty, or not Guilty.

Mr. *Speaker.* Will you let me propoſe it to you thus then, *That the Councel, in producing their Evidence againſt Sir John Fenwick, be allowed to examine Witneſſes touching the Treaſons mentioned in the Bill, for which* Sir *John Fenwick is Indicted?*

Mr. *James Mountague.* I do not obſerve, that in Reading of it, you ſay any Thing as to the other Allegations of the Bill: I think you ſhould word it, *That the Councel be allowed to produce Evidence to the Allegations in the Bill, and the Treaſons whereof he ſtands Indicted.*

Mr. *Speaker.* Well then, the Queſtion is this, *That the Councel in managing the Evidence againſt Sir* John Fenwick, *be allowed to produce Evidence touching the Allegations in the Bill, and the Treaſons for which he ſtands Indicted.*

Which Queſtion being put, it paſſed in the Affirmative.

Mr. *Speaker.*

Mr. *Speaker.* Will you pleaſe to app oint a time for it?

Mr. *J. Howe.* I humbly move you, having been ſo extreamly late before you went upon this Information, that you had not time to go through any part of it; That you would appoint early in the Morning for Sir *John Fenwick* to be here.

And thereupon the Houſe reſolved to proceed further in the matter on *Monday* at 10 a Clock, and Ordered, That Sir *John Fenwick* ſhould be remanded to *Newgate*, and brought again to the Houſe at that time.

Mr. *James Montague.* Sir *John Fenwick* now inſiſted he had not notice; I humbly move, that he may be brought in, and acquainted with what you have Ordered.

Accordingly Sir John Fenwick *was brought to the Bar.*

Mr. *Speaker.* Sir *John Fenwick,* The Houſe have conſidered of what you ſaid at the Bar, by your Councel, and they are of Opinion, That Witneſſes ought to be Examined, to prove the Allegations of the Bill, and to prove you Guilty of the High Treaſon whereof you ſtand Indicted. But in favour to you, becauſe your Councel ſaid you were not prepared, the Houſe is willing to give you time till *Monday* next, to make your Defence; and they require you to give in a Liſt of your Witneſſes, and if you ſend to me, you may have a Warrant for their appearing at that time; and they require you to be here, ſo that they may proceed upon the Bill exactly at Ten a Clock.

And Sir *John Fenwick* being withdrawn.

Reſolved,

That the Bill for Attainting Sir John Fenwick *of High Treaſon, be Read a ſecond time on* Monday *next*

Lunæ 16 *die Novembris*, 1696.

The Houſe order'd that the *Speakers* Chamber and Lobby ſhould be cleared of all Perſons, but the Members

bers of the Houſe, and Sir *John Fenwick*, the *Council*, *Witneſſes* and *Solicitors*. And that the back doors of the *Speaker*'s Chambers ſhould be locked up.

Mr. *Speaker*. Gentlemen, I would receive your Directions in one thing. You have Ordered a Member to produce a Letter, and the Councel, in opening the Evidence, have referred to it. That Member deſires to know the proper time for him to do it, Whether while the Councel are managing the Evidence at the Bar, or whether he muſt ſtay till they are withdrawn?

Mr. *Sloane*. As to this Matter, I do not queſtion but 'tis to be offered as an Evidence; and by the ſame Reaſon that you give Sir *John Fenwick* the favour to Examine the Witneſſes that are produced againſt him, for the ſame Reaſon the Letter ought to be Read in his preſence, that he may explain it, or deny it if he think fit. And give me leave to tell my Thoughts of another Matter. If that Worthy Member is to offer Evidence of what he took from Sir *John Fenwick*'s Mouth, (though a Member commonly gives his Evidence in his place after the Councel is withdrawn) I think 'tis not only fair to produce the Letter in his preſence, but that Sir *John Fenwick* ſhould hear what he ſays, and deny it if he can.

Mr. *Speaker*. Is that your Pleaſure, *that the Letter be produced before Sir* John Fenwick, *and that the Evidence to be given by Mr.* Vernon *ſhall be while Sir* John Fenwick *is at the Bar?*

The Queſtion being accordingly put it paſſed in the Affirmative.

Then the Sergeant was Ordered to take his Mace, and go into Weſtminſter *Hall, and Summon the Members to attend immediately,* (which he did)

And being returned, the Order of the Day for Proceeding on the Bill of Sir *John Fenwick* was Read. *Memorandum. It was a quarter before Eleven in the Morning.*

Then

Then Sir *John Fenwick*, and the Councel and Solicitors, on both ſides were brought in.

Mr. *Speaker*. Sir *Thomas Powys*, When you were here laſt, you inſiſted upon it, That the Councel againſt Sir *John Fenwick* ſhould be kept to the Proofs relating to the Allegations in the Bill only; or elſe that you might have further time, becauſe the Witneſſes were not ready. The Houſe have conſidered that Matter, and in favour to Sir *John Fenwick*, that he might have no ſurprize, have given him to this Day; But they do allow the Councel to give Evidence not only as to the Allegations in the Bill, but to prove Sir *John Fenwick* Guilty of High Treaſon; and therefore Mr. Sergeant *Gould*, you are at liberty to go on with your Evidence.

Mr. *Sergeant Gould*. May it pleaſe you, Mr. Speaker, We are here to give in our Charge, and the Evidence that we have againſt Sir *John Fenwick*, I find by your Order, That we are now allowed to produce Evidence touching the Allegations of the Bill, and likewiſe of the Treaſons for which he ſtands Indicted; therefore I ſhall beg leave to open firſt, How he ſtands Charged by the Indictment.

The Indictment firſt Charges him with Compaſſing and Deſigning to Depoſe the King, and put him to Death. The Second Charge is, For Inciting the French King to ſend an Army of Soldiers to Invade this Kingdom, and to make a miſerable Slaughter amongſt the Kings Subjects. The Third thing is, For adhering to the King's Enemies. The Fourth Part is, That to effect this, he, together with, *Charnock*, Sir *John Friend* and others, did Conſult, Propoſe, Treat, and Agree to Invite the French King to ſend a Number of Soldiers to Invade this Kingdom, and to Procure great numbers of Armed Men againſt the King, to Riſe and be Formed; and with the Enemies of this Kingdom, upon their Landing and Invading thereof, to Joyn, for to Make and Carry on a Rebellion and War in this Kingdom. And further

it

it Charges, That he did Conſult, Conſent and Agree, to ſend *Charnock* as a Meſſenger from Sir *John Friend*, and others, into *France* to the late King *James*, to Propoſe to him, to procure the French King to ſend Soldiers and Armed Men to Invade this Kingdom. Then likewiſe to Effect this, the Indictment Charges him with Providing Horſes, Piſtols, and other Warlike Arms. This is the Charge of the Indictment; and theſe Matters are in the Bill: For the Bill does Charge him with Compaſſing and Imagining the Death and Deſtruction of the King, with Adhering to his Enemies, by Conſulting and Agreeing with ſeveral Perſons at ſeveral times, to ſend *Charnock* to the late King *James* in *France*, to Invite and Encourage the French King to Invade this Kingdom with Armed Forces, and Promiſes to Joyn them, and Aſſiſt them with Men and Arms.

Then the Bill does take notice of other Matters, That Sir *John Fenwick* hath Protracted his Tryal, by giving Aſſurances to the King to make a plain and full Diſcovery; by reaſon of which he put off his Tryal, and now one of the Witneſſes againſt him is withdrawn. May it pleaſe you, Sir, This is the Charge as it ſtands before this Honourable Houſe. And the Evidence we ſhall Charge him with, will be of this Nature; We ſhall give you an Account, That the latter end of *May*, or beginning of *June*, Sir *John Friend* and *Charnock*, and ſeveral other Perſons, met at the *King's-Head*, and upon that Meeting they Conſulted how to Invade this Kingdom; and they Concluded in this, That they would ſend *Charnock* into *France*, and he was to Propoſe it to King *James*, That he ſhould Procure 8000 Foot, and 2000 Horſe and Dragoons of the French King; and upon their Landing they were to Joyn them with 2000 Horſe. After this they had another Meeting; (for *Charnock*, to be ſure of the Matter, would have another Meeting) and then *Charnock* Propoſed it to them, Whether they continued in the ſame Reſolution? And

they

they all then Declared, particularly Sir *John Fenwick*, That they did Approve of it, and Stuck by it, and that *Charnock* ſhould go for that Purpoſe to *France*. *Charnock*, in Purſuance and Execution of this Treaſon, did go to *France*, and afterwards brought back an Anſwer, That the Matter had been Communicated to the *French King*, but at that time he was not ready for them, and could not ſpare his Soldiers, or Troops. Then it reſted for ſome time, till towards *Chriſtmas*, when Sir *George Barclaye* came into *England*, and he brought with him a Detachment of about Sixteen, and their Province was to *Aſſaſſinate* the King: But there was another Part, and that was the *Invaſion*, and in that Part was Sir *John Fenwick* Concerned, which we ſhall produce our Evidence to prove upon him. But it does fall out that we have but one Witneſs to this Matter that we can produce *Viva Voce*; though when this Indictment was found, (for it was found upon the Act laſt Seſſions, which required two Witneſſes to each Species of Treaſon) we had two, but one is ſince withdrawn, and that is touched in the Bill, as in truth the Fact is. If Sir *John Fenwick* had come on in the Ordinary Courſe of Proceedings to be Tryed, Sir *John Fenwick* might have been Tryed upon his Indictment, for then *Goodman* had been here; but he Procraſtinates his Tryal, he makes Application to the King, and gives him Aſſurances from time to time of an Ingenuous Diſcovery till *Goodman* is withdrawn, and then theſe Aſſurances terminate in this Counterfeit Confeſſion that hath been laid before the Houſe, and is Charged in the Bill.

But, Sir, to ſupply this, we ſhall produce the Examination of Mr. *Goodman*. We ſhall prove to you not only the Evidence that hath been given upon this Indictment upon which he hath been Arraign'd; but alſo the Evidence which hath been given upon the Tryal of *Cook*, who was Convicted upon that Evidence. We ſhall go by theſe further ſteps in the

Caſe,

Caſe, and humbly offer it to the Conſideration of this Houſe, how far Sir *John Fenwick* will be affected with it, and that is this. There was *Goodman*, and Captain *Porter*, Witneſſes againſt Sir *John Fenwick*, Captain *Porter* ſtill ſtands his Ground; but they have tempted him with 300 Guineas in hand, and 300 more were to be remitted to him upon his firſt Landing in *France*, with Aſſurance likewiſe of King *James*'s Pardon, and likewiſe 300*l.* a Year; 100*l.* a Year whereof was to be ſettled by Sir *John Fenwick*. This Propoſition ſprung from one *Clancy*: It could not be expected that Sir *John Fenwick* ſhould appear in his proper Perſon, but he did make it by his Lady, who was with Captain *Porter*, and gave him Aſſurance that all that was Propoſed by *Clancy*, ſhould be Performed, and a great deal more.

We ſhall further give this Account, That when Sir *John Fenwick* was taken, there was a Letter handed to a third Perſon; and it appears by that, that he thought himſelf at that time not ſafe, unleſs they could corrupt the Jury: For, ſays he, *we muſt now get Two or Three ſtanch Perſons that will ſtarve the reſt.* Theſe Steps we ſhall proceed upon, and begin with the Indictment, and call our Witneſſes to it.

Mr. *Serg. Lovel.* Mr. Speaker, I ſhall not repeat what hath been ſaid; becauſe I know what hath been materially ſaid, can't paſs the Obſervation of this Houſe. The Method we deſire leave to proceed in, is the Method you have preſcribed us; and that is, firſt to prove the Allegations of the Bill: And we ſhall make it appear to you by undoubted Proofs, That Sir *John Fenwick* does ſtand indicted for theſe Treaſons at the Seſſions at the *Old Baily*, the 28th of *May*, upon the Oaths of *Porter* and *Goodman*, that we ſhall prove by Records, and that is not Capable of any Traverſe or Denial. We ſhall alſo prove by matter of Record, That ſeveral, who were concerned with Sir *John Fenwick* in this conſpiracy, have been Tryed and Attainted; and then we ſhall call a living Witneſs

neſs to prove Sir *John Fenwick* guilty of Treaſon in the higheſt Manner. Mr. *Tanner*, deliver in the Indict. of Sir *John Fenwick*,

Which was delivered in, and read at the Table,

Mr. *Serg. Lovel.* The Bill does Charge, That he ſtands Indicted upon the Oaths of theſe two, Captain *Porter* and Mr. *Goodman*: Beſides I muſt beg leave to obſerve, that by the Act of Parliament made laſt Seſſions, 'tis Enacted, That no perſon ſhall be Indicted unleſs upon the Oaths of two Witneſſes; had not theſe Witneſſes been Sworn before the Grand Jury at that time, this Bill could not have been found according to that Law, nor would Sir *John Fenwick* have pleaded: But he hath been Arraigned, and Pleaded; ſo that we ſubmit it to this Houſe, that it does appear upon Record, That this Indictment was found upon the Oaths of two Witneſſes: Beſides that, two Witneſſes are ſubſcribed to the Bill. Now that other Perſons have been Indicted, and Convicted upon the ſame Evidence, we ſhall prove, and that likewiſe by Records.

Mr. *Sergeant Gould.* I thought when we came to give you an Account of the Abſence of *Goodman*, then to have given you an Account, of this and other Matters.

Mr. *Speaker.* You will agree upon your Method, Gentlemen: Who do you call in the firſt Place?

Mr. *Serg. Gould.* Captain *Porter*, Sir.

(Who being preſent.)

Mr. *Serg. Gould.* I deſire, Mr. Speaker, that he will give an Account of what he knows concerning this Matter, as alſo of what is Charged in the Indictment.

Mr. *Speaker.* Captain *Porter*, the Houſe requires you to give them an Account of your Knowledge of any Conſpiracy, by Sir *John Fenwick*, againſt the King and this Government; and likewiſe of your Proceedings upon the Indictment againſt him for High Treaſon.

Capt.

Captain Porter. About the middle of *May* was Twelve-months, there were two Conſultations, one at the King's Head in *Leadenhall-ſtreet*, and the other in St. *James's Street*; theſe two Conſultations were for the Conſidering of the beſt Means to bring the late King *James* into *England* again: For it was ſaid, That King *William* being gone beyond Sea, he had left but few Forces, and therefore they thought they could not have a fitter Opportunity than that Juncture; upon which they pitched upon *Charnock* to go into *France*, and make ſome Propoſals to the late King *James*, to borrow 10000 Men of the *French* King, whereof there ſhould be 8000 Foot, 1000 Horſe, and 1000 Dragoons; and it was propoſed, when they came over to meet him with 2000 Horſe.

Mr. *Speaker.* Where was this?

Captain Porter. Our firſt Meeting was at the King's Head in *Leadenhall-ſtreet*; after that, Mr. *Charnock* deſired another Meeting, and then we met at Mrs. *Mountjoy's* in St. *James's*, and we all ſtood to what we had before Reſolved, That he ſhould go over to King *James*, and make this Propoſal; and that if he could get ſo many Men of the *French* King, we would meet him with ſo many Horſe.

Mr. *Speaker.* Sir, you ſay the firſt Meeting was at the King's Head in *Leadenhall-ſtreet*, who was then preſent?

Captain Porter. There was my Lord *Aylesbury*, my Lord *Mongomery*, Sir *John Fenwick*, Sir *John Friend*, Sir *William Perkins*, *Charnock*, Mr. *Cook*, and my ſelf; we Dined there, and after Dinner Mr. *Goodman* came in to us.

Mr. *Speaker.* Did Sir *John Fenwick* hear this Diſcourſe?

Captain *Porter.* Yes, Sir.

Mr. *Speaker.* Did Sir *John Fenwick* conſent to it?

Captain Porter. He did abſolutely Conſent to it. Sir *John Friend* did propoſe to bring *Four* or *Five* Thouſand Men, but ſays Sir *John Fenwick*, Do not let us propoſe more than we can bring.

Mr. *Speaker.* Then you ſay you had a Second Meeting.

Captain *Porter.* When we agreed upon this Buſineſs in *Leadenhall-ſtreet*, Captain *Charnock* deſired another Meeting, to know if we continued in our Reſolution, and the next Meeting was at Mrs. *Mountjoy*'s, I think then my Lord *Mongomery* was not there, nor Mr. *Goodman*, but there was my Lord *Aylesbury*, Sir *John Fenwick*, Sir *John Friend*, Sir *William Perkins*, Mr. *Charnock*, and my ſelf.

Mr. *Speaker.* How long after?

Captain Porter. About Eight or Ten Days, to the beſt of my Remembrance.

Mr. *Speaker.* What was ſaid at that Meeting?

Captain Porter. The Second Meeting was to agree to the ſame Thing: We deſired *Charnock* to go as ſoon as poſſible to acquaint King *James*, that the ſooner he came that Year the better.

Mr. *Speaker.* Did Sir *John Fenwick* conſent and agree at the Second Meeting, to his going into *France* to procure the Forces?

Captain Porter. Yes, Sir.

Mr. *Speaker.* Will you give the Houſe an Account of any thing elſe you know relating to this Matter?

Captain Porter. That is all.

Mr. *Sergeant Gould.* Was you Examined by the Grand Jury, when the Bill was preſented againſt Sir *John Fenwick.*

Captain Porter. Yes, Sir.

Mr. *Sergeant Gould.* What Evidence did you give to them?

Captain Porter. The very ſame I give now.

Mr. *Speaker.* Mr. Sergeant *Gould*; what have you to ſay further to him?

Mr. *Serjeant Lovel.* We would ask, whether Mr. *Cook* was at the firſt Meeting.

Captain Porter. Yes, Sir, he was at both Meetings?

Mr. *Ser*

Mr. *Sergeant Lovel.* Was Mr. *Goodman* at the preferring of the Bill of Indictment at the *Old Baily*?

Captain Porter. I ſaw him go in to the Jury, and he told me it was for the ſame Thing.

Mr. *Sergeant Lovel.* We have ſome of the Jury here, and we will call them to that.

Mr. *Sergeant Gould.* Now, if it pleaſe you, Sir, we will ask him to the Matter concerning *Clancy*'s Tampering with him.

Mr. *Speaker.* Will you give the Houſe an Account of that Matter?

Sir *Thomas Powys.* By your Favour, I hope you will give us leave to interpoſe in this Matter: For I am ſure in the Caſe of Life, and in Caſe where there is a Law prepared to be made, ſubſequent to the Fact, to condemn a Man to Death, you will not only have good Evidence but that which is legal Evidence. And I take it that in Caſes of this Nature, of a ſubſequent Law, the Evidence ought to be much ſtronger, and much fairer, than when a Man is to be tryed by a Law in Being. If they ſhould offer that which was ſaid in the great Caſe of my Lord of *Strafford*, (which Attainder there hath been an Act of Parliament to Reverſe) by a Gentleman that did then appear againſt my Lord *Strafford*, That where the Houſe proceed in a Legiſlative way, there needs no Evidence at all, but every Man may follow the Dictates of his own Thoughts and Conſcience. 'Tis in *Ruſhworths*'s *Hiſtory of that Tryal, fol.* 377. Yet, I hope, you will be of another Opinion and expect ſtronger Evidence, than if a Man was to be tryed by a Law in Being. Now that which is offered, cannot be allowed in any Court of Juſtice: They were going about to ſhew, That my Lady *Fenwick*, the Wife of the Gentleman at the Bar, had uſed ſome means to take off *Goodman*'s Evidence, and they would make uſe of that againſt her Husband. Now what any Man's Wife ſays cannot be made uſe of againſt him, as nothing that ſhe ſays, or does, can

be made uſe of for him; and, by the ſame Rule of Juſtice it cannot be made uſe of againſt him: For otherwiſe the Rule would be unequal, That ſhe might be a Witneſs againſt him, but not a Witneſs for him; that ſeems ſo unjuſt, that it will not be admitted in any Court whatſoever.

Sir *Barth. Shower.* By your Votes the Priſoner is allowed Councel, and the King's Sergeants are to produce the Evidence againſt the Priſoner. We believe, and hope therefore that you will give us leave to object to that which is not ſo; and in this I appeal to the knowledge of the Gentleman on the other ſide, who hath had a great deal of Experience of this kind: and dare ſay in all his Obſervations in the *Old Baily* he can't produce an Inſtance where the Actions or ſayings of other Perſons, were admitted as Evidence, in Caſe of Treaſon, nay not in Felony; and I muſt confeſs I wonder to hear him move it now.

When attempted on behalf of a cloſe Priſoner, that was not Viſited by any Body, it was not admitted that the Actions of a third Perſon at large, ſhould be admitted againſt him: There the Actions of a Wife cannot be Evidence for, nor againſt her Husband. It was never but in one Caſe, and that for Sodomy, allowed, and that was after two or three Witneſſes beſides had been produced, and by the Opinions ever ſince it hath been allowed not to be Law, and that for the Miſchief might follow to the diſſolution of Marriage and Ruin of Families. Now what they offered does concern the Acts of other Perſons, and not Sir *John Fenwick.* Beſides I have one Objection more, and that is, There is no ſuch thing alledged in the Bill; and the Order is, That they ſhould produce Evidence as to the Allegations in the Bill, and the Treaſons in the Indictment; but I never heard of any Order that they ſhould produce Evidence concerning the carrying away of any Witneſs; and 'tis not alledged, that *Goodman* is withdrawn by Sir *John Fenwick*'s Privity: As to *Porter*'s being tamper'd with,

there

there is no colour of Suggeſtion in the Bill ; ſo that this neither being in the Bill, nor being Evidence at Law, we hope you will not admit it.

Mr. *Speaker.* You hear the Exception, What do you ſay to it?

Mr. *Sergeant Gould.* I think what theſe Gentlemen ſay, will receive a plain Anſwer. It is an Allegation in the Bill, That *Goodman* hath withdrawn himſelf. Now the uſe we make of this, is to let us in to give an Account of what *Goodman* hath Sworn, and to Entitle us to Read his Examination : For ſay we, *Clancy* hath been tampering to ſtifle this Conſpiracy, to take off the King's Evidence. No body doubts of this Execrable and Wicked Conſpiracy, and 'tis as plain here hath been two Witneſſes to prove it, and as plain that this Indictment is found, according to the late Act of Parliament, upon the Evidence of *Porter* and *Goodman.* Now to ſhew this Conſpiracy is carrying on, we offer to prove the tampering that hath been, to take off the King's Evidence, and would lay that before the Conſideration of this Houſe ; ſo the uſe we make of it, is only preparatory to let us in to tell you what *Goodman* hath Sworn, and in good time we ſhall produce to you an Indictment, by which it will appear that upon his Oath, and the ſame Evidence as we offer here, another of the Traytors hath been Convicted. And therefore we humbly offer it, Whether as this Caſe is, we ſhall not be admitted to prove this tampering?

Mr *Serg. Lovell.* Before we withdraw, I beg two Words as to what is Objected on the other ſide for the learned Gentleman Appeals to me, and I muſt Appeal to the Knowledge of ſome Members that are learned in the Law, That even in Criminal Caſes, the Courts are not bound up to poſitive Evidence, but that the Evidence of Circumſtances, with ſome Perſons to corroborate them, is Admitted: And if it ſhould be ſo, that nothing but poſitive Evidence ſhould Convict, we ſhould have very few Convicti-

ons at the *Old Baily*. As to Clipping and Coyning where one is Convicted by poſitive Evidence and direct Proof, forty are Convicted and Attainted by Circumſtances, as Materials found about them, and putting off Counterfeit Mony. Sir, I muſt ſubmit to you, Whether, as the nature of this Caſe is, this Houſe will not think fit to hear all Evidence that may concern this Matter, whether poſitive or Circumſtantial; and the Wiſdom of this Houſe will diſtinguiſh afterwards, what they think is material, and what is not. We do take this to be part of the ſame Conſpiracy which we do Charge the Priſoner at the Bar with, that he might not come to Condign Puniſhment, and therefore we pray, that let the Proceedings of other places be what they will, that you will hear the whole Matter in this Caſe, whether the Evidence be Poſitive or Circumſtantial.

Sir *Tho. Powys*, I think they miſtake us when they give us ſuch an Anſwer; we doubt not but there is Poſitive Evidence and Circumſtantial, but we ſuppoſe this to be no Evidence at all: Mr Recorder tells us true, That Circumſtantial Evidence is frequently made uſe of; but we ſay, That whatever my Lady *Fenwick* hath ſaid or done, is not to be Admitted as any Evidence againſt the Priſoner at the Bar; becauſe what ſhe hath ſaid by way of Endeavour to draw off *Goodman*, is no Evidence at all to be offered againſt her Husband, and is not ſo much as Circumſtantial Evidence.

Sir *Barthol. Shower*. We do Agree, That If the Bill had been brought in againſt my Lady *Fenwick*, or againſt *Clancy*, this had been proper Evidence; and they may deſerve Puniſhment for it themſelves: But this is no Evidence againſt Sir *John Fenwick*, to prove a Crime againſt him.

Mr. *Serg. Lovell*. We think 'tis properly before the Houſe, even by the Order of the Houſe it ſelf, For in the firſt place, we are to ſpeak to the Matters contained in the Bill. One Matter is, That Sir *John Fenwick*

Fenwick had been Tryed before now, but for Reaſons mentioned in the Bill, and that he delayed his Tryal, till ſuch time as *Goodman* was withdrawn; therefore what lies before us by the Direction of the Houſe, is, That till ſuch time as *Goodman* was withdrawn, Sir *John Fenwick* did pretend to go on to make a Diſcovery, and afterwards put it off with what is Charged in the Bill: But ſay they, What is done by my Lady *Fenwick*, is no Evidence againſt him. When all the Circumſtances are laid before the Houſe, what dealings there was with Captain *Porter*, and what was ſaid at that time, and the Conſequence, preſently after *Goodman's* going a way, I hope it is as much Evidence as the Caſe will bear.

Sir *Richard Temple.* Sir, I Deſire they may withdraw.

Accordingly they withdrew.

Sir *Richard Temple.* I think it much concerns the Honour of the Houſe, when a Priſoner is at the Bar, that he ſhould be allowed the Right of an Engliſhman; what you do here, may be a Precedent in after Ages. You are told what is offered as Evidence here, is admitted in no Court, and the Anſwer that is made to it, is of no force at all. They tell you there is no Allegations in your Bill, That Sir *John Fenwick* had any hand in his withdrawing, nor nothing in the Indictment of it, and for that Reaſon the Evidence ſeems improper, and if it was, this would be no Evidence at all againſt Sir *John Fenwick*, for Oaths againſt other Perſons is no Evidence againſt the Priſoner to make him Guilty of any thing.

Lord Cutts. I think 'tis Agreed already, That the Councel for the Priſoner ſhould not meddle with the Authority and Jurisdiction of this Houſe. For if we are to be tied up to all the Forms and Niceties obſerved in Inferior Courts, then to what end is the Priſoner brought here? I think Evidence ought to be Admitted that may clear every Man's Conſcience, that this Bill againſt Sir *John Fenwick* ought to paſs.

Mr. *John Howe.* A Gentleman ſaid, we are not tyed to the Forms of Inferiour Courts; but though we are not to the Forms of Inferiour Courts, we are tyed to that which was the Ground of them, and that is right Reaſon and Juſtice: They have alledged that he was Indicted, no body doubts it. That *Goodman* is withdrawn, no body doubts it: But what is that to Sir *John Fenwick?* It might be with a deſign for Good or Evil to Sir *John Fenwick.* I deſire you would ask Captain *Porter* when he comes in, Whether this was Diſcourſed before Dinner, at Dinner, or after Dinner? And whether he knows that *Goodman* heard this?

Mr. *Chancellor of the Exchequer.* There ſeems a particular ſhyneſs to know the truth of this Matter, I mean in the Councel the other Day; the Gentleman ſays that *Goodman* might be withdrawn to the Prejudice of Sir *John Fenwick*, as well as for his Good. I deſire you will not let the Government be ſo Stigmatized. You have given leave I preſume to the Councel to Examin to any thing that may be added to the Bill; for upon a Commitment, I can move you to put in any thing that ſhall be thought reaſonable.

Sir *Thomas Dyke.* It may be a reaſonable thing to Enquire why *Goodman* is withdrawn. But the Queſtion is, Whether this be a proper time? The Houſe is not tyed to the Common Forms of Law, but they are tyed to the Common Rules of Equity: And the Queſtion is, Whether the Houſe will permit any Perſon to ſuffer by the Acts of another?

Mr. *Soll. Gen.* It is Diſcretionary, whether you will determine that this is Evidence now, or after you have heard it, but I won't enter upon the Legality of the Evidence. 'Tis one thing when a Man is to be Tryed by a Jury, and another thing when he is to be Tryed before Judges. A Jury may be ſo Swayed and Poſſeſſed by it, that it may not be fit for them to hear it: But look into the Court of Chancery, and there Depoſitions, if one ſide ſay

they,

they are Evidence, and the other ſide ſay they, are not, are every Day Admitted to be Read, and 'tis generally ſaid, that it is ſooner diſpatched by hearing of it, than not. You do not ſit here as a Jury only, but as Judges alſo; and will conſider how far the Actions of a Wife ſhall concern her Husband. You will do the Priſoner right, and your ſelves right, if you will hear the Witneſs.

Sir *Francis Winnington.* The Queſtion is, Whether the King's Counſel ——

Mr. *Speaker.* Let me ſet you right, they are not here as King's Councel.

Sir *Francis Winnington.* Very well. But in this Houſe you are the Judges and Jury too. The Evidence that is opened, is to induce you to believe, that he is Guilty, and the Gentleman that ſpake laſt, will not allow it to be a Legal Evidence. Then the Queſtion is, Whether you being Judges of the Fact, as well as of the Law, ſhould be afraid to be induced to believe a Fact, by that which is not Legal Evidence? Suppoſe my Lady *Fenwick* had had this Deſign, and had told her Husband what ſhe intended to do, and he ſhould have ſaid, he ſcorn'd it, This is poſſible, if you go to ſuppoſing, and that he might apprehend it would do him a miſchief. Now it can be to no purpoſe to hear this Evidence, unleſs it be to ſatisfie the Houſe, in Order to Attaint the Priſoner. No, but ſay they, Let us hear, and we will judge afterwards: Why ſo? It can't affect the Priſoner. And if any Perſon hereafter have a mind to have my Lady *Fenwick* Puniſhed they may examine it.

Mr. *Sloane.* The Gentleman that ſpake laſt, hath made one Suppoſal. Let me make another. He ſuppoſes, That it may appear by the Evidence, upon the Examination of Witneſſes, that what my Lady *Fenwick* or *Clancy* did, was contrary to the Direction of Sir *John Fenwick*: If the Evidence happen to be ſo, 'tis nothing. But we may ſuppoſe again; Suppoſe

poſe it happens, that it appears by the Evidence, that it was for the Benefit of Sir *John Fenwick*, as in truth it was, to the greateſt Degree, to get away one of the Witneſſes, *& Cui bono*, is the ſtrongeſt Preſumption to me. I do allow in *Weſtminſter* Hall, that a Woman ſhall not be a Witneſs for or againſt her Husband; but if ſhe be directed by her Husband, *Qui facit per alium, facit per ſe*, What ſhe does by his direction may be Evidence. You do not alledge all the Evidence in the Indictment, that runs in general. If the Evidence differs as to time and place, the Jury may find him Guilty of the Indictment.

Lord Norreys. Becauſe I would not willingly go upon Suppoſitions, I deſire the Clerk may Read the Queſtion that you have paſſed the laſt Day as to Examining Evidence.

Which was Accordingly Read.

Now I deſire to know, whether this be Treaſon within the Indictment, or any of the Allegations of the Bill. Otherwiſe I think you have tyed your ſelves up by that Rule.

Mr. *Pelham.* I did expect the Gentleman that ſpake lately, would have cleared the Matter. He gave you a Diſtinction between the Proceedings of *Weſtminſter* Hall and the Court of Chancery. I am Ignorant of both. I deſire to know, whether we are to go here by the Proceedings of *Weſtminſter* Hall, or the Court of Chancery? If we are not tyed by thoſe Rules, whether we may let our ſelves into any Evidence that will induce us to believe him Guilty or not Guilty. If we are tyed to thoſe Rules that are obſerved in all Courts of Juſtice, where Tryals of Treaſon are had, this can be of no Validity. So I deſire to know, whether we are to go according to the Proceedings of thoſe Courts, or whether we may Proceed as the Court of Chancery?

Sir *Thomas Littleton.* The Honourable Member that ſpake laſt, deſires to know, Whether we are bound by the Rules of *Weſtminſter* Hall, in their Proceedings

ceedings or not? I believe it would have been to very little purpoſe to have thought of this Bill, if thoſe Courts could have Convicted him. I believe if the Councel had tyed you to the Proceedings of *Weſtminſter* Hall, and thence have inferred that you could not have Proceeded on this Bill, you would have taken notice of them, and reprimanded them for ſaying ſo. I know not what to ſay to the Proceedings of Chancery in this Caſe; but I ſuppoſe upon this Tryal, you will inform your ſelves by the beſt Methods you can; and every Man, according to his Judgment, be for, or againſt this Bill. If upon what I hear, I am of Opinion, he is notoriouſly Guilty, I ſhall freely paſs the Bill. If I do ſo much as doubt that he is Guilty, according to the old Rule, *Quod dubitas ne feceris*, I ſhall not be for it, and in Order to this, I am for hearing every body that comes before us. It is ſaid, that poſſibly *Goodman* is withdrawn to Sir *John Fenwick's* prejudice, I would be glad to hear that, if ſo, I ſhall have the worſe Opinion of the Bill. They ſay, 'tis not alledged in the Bill, concerning Captain *Porter's* being tampered with; but 'tis only alledged, That *Goodman* is withdrawn, and not that *Porter* was privy to it; but it may weigh in Gentlemens Judgments, how he comes to be withdrawn, They that tamper with one Witneſs, may be thought like to tamper with another. They tell you, That the Evidence of a Man's wife will not weigh againſt her Husband. It may ſo in point of Law, but if you think your ſelves bound up to the ſtrict Rules of Law, diſpoſe of your Bill preſently.

Sir *Will. Coryton.* You have been pleaſed to give leave to the King's Councel to prove Matters againſt Sir *John Fenwick*: You have heard Captain *Porter* upon the Fact. If they had opened the Matters, that Sir *John Fenwick* was Inſtrumental to convey *Goodman* away, I ſhould have been willing to have heard it: But they opened it, That my Lady *Fenwick*

wick was Inſtrumental in Conveying away *Goodman*: and this ought in no ſort to be Admitted for Evidence in this Caſe. An Honorable Gentleman of the Long Robe made a difference in the Proceedings between the Court of Chancery, and the Courts of *Weſtminſter* Hall: But I would fain know, if a Fact was controverted, Whether my Lord Keeper could determine the Matter before a Commiſſion went to prove it. 'Tis true, we are not tyed to the Forms of Law, but we are tyed to the Forms of Juſtice. I know no Caſe where a Wife is Admitted to be a Witneſs for or againſt her Husband. In *Brown's* Caſe indeed, who took a Woman away, and forced her to Marry him, the Queſtion was, Whether ſhe ſhould be Admitted? And in that Caſe ſhe was Admitted as a Witneſs, becauſe the Neceſſity of the thing required it: and there was no other way to prove, whether he had her Conſent or not. Another Caſe there was of my Lord *Caſtlehaven*, where from the Nature of the thing, it was Admitted; for it was impoſſible there ſhould be any other Proof of it. But if my Lady *Fenwick* be Guilty of this Matter, it muſt only by way of Inference, affect Sir *John Fenwick*. They tell you, they Inſiſt upon it as an inducement, then it comes to be a Matter of Conſequence; and therefore ſince the Matter hath been fully ſtated to the Houſe, as to what they would prove: I think we may now give our Judgment upon it.

Mr. *Boſcawen.* You are here in your Legiſlative Power, and are no more tyed to the Rules of Law in Examining of Witneſſes, than you are in giving of Judgment; for you can give thoſe Puniſhments that never are given in *Weſtminſter* Hall. I am of Opinion that my Lady *Fenwick* cannot be Examined for or againſt her Husband; but if he ſend her to Solicite for him, it ſhall have ſome weight with me. Thoſe that don't believe it from what he ſays, may give their Judgment accordingly: I deſire to know of this Gentleman, if I don't believe it, whether I

can

can give Judgment againſt him? I believe a Man's Conſcience ought to go with his Judgment.

Mr. Speaker. I will Read the Queſtion. *That Captain Porter be Examined to the Attempt of taking off his Teſtimony as to the late Conſpiracy.*

Which Queſtion being put, it paſſed in the Affirmative.

Mr. *R. Harley.* I ſuppoſe Sir you will let the Councel of both ſides have firſt done with their Queſtions; and then there will be ſome Queſtions propoſed to you.

Mr. *Howe.* They tell you how that Sir *John Fenwick* was Indicted, and that *Goodman* is withdrawn; but there is one Thing the Councel of both Sides ſlip over, and that is, Sir *John Fenwick hath given in falſe Informations.* It looks as if they were agreed on both Sides in that Matter. I deſire the King's Councel may be asked, Whether they have any Evidence as to that particular?

Col. Crawford. Since I am mentioned in that Paper.——

Admiral Ruſſel. I believe though that Gentleman was afraid that Matter would have been paſſed over, the Gentlemen of this Houſe that are therein Named will take care, for their own Vindication, That that Matter ſhould not be ſlipped over, I ſuppoſe the proper Time for that is, when the Evidence is over. I aſſure you, if no Body elſe will, I will.

Then Sir John Fenwick, *and the Councel of both Sides and Captain* Porter, *were brought in.*

Mr. Speaker. Sir *Tho. Powys,* The Houſe hath conſidered of your Exception to the Teſtimony of Captain *Porter,* as to the Point he was to be Examined to, and they are agreed, That 'tis fit that all the Evidence ſhould be laid before them, and they can judge afterwards, whether it be material or fit to be allowed, or not. Therefore, Captain *Porter,* Pray do you give the Houſe an Account at large of what Attempts have been made upon you, at any Time,

to

to draw you off from your Teſtimony, with reſpect to the late Conſpiracy.

Capt. Porter. I had a Metting with one *Clancy*, firſt in *Mitre Court*, at Mrs *Moretons*, and afterwards at the King's Head Tavern, by the Play-houſe: At thoſe Meetings he propoſed to give me 200 Guineas to bear my Charges to *France*, and to ſend me a Bill for 300 more; and likewiſe that I ſhould be allowed 300*l.* a Year.—

Mr. *Speaker.* How long had you been acquainted before?

Captain *Porter.* Several Years.

Mr. *Speaker.* Did he tell you who he came from?

Captain *Porter.* After the firſt meeting he told me he had been with Sir *John Fenwick*, who deſired him to make this Propoſal to me?

Mr. *Speaker.* How often had you Meetings with him;

Captain *Porter.* About Seven or Eight times.

Mr. *Speaker.* What Satisfaction did he give you, that Sir *John Fenwick* would perform the Agreement?

Captain *Porter.* He told me, my Lady *Fenwick*, and my Lady *Mongomery*, ſhould meet and confirm every Thing that Night. The Day before I was to go, I met with my Lady *Fenwick*, who told me, my Lady *Mongomery* could not come, becauſe one of her Children was fallen Sick.

Mr. *Speaker.* What Satisfaction did ſhe give you, that Sir *John Fenwick* would perform what *Clancy* had propoſed?

Captain *Porter.* She ſaid, what *Clancy* had propoſed ſhould certainly be made good.

Mr. *Sergeant Gould.* Did you receive any Thing in part, in purſuance of this Agreement?

Captain *Porter.* I received 200 Guineas of *Clancy*, and he promiſed to me a Bill of 300 more, which he ſayd was depoſited in his Hands, to be ſent after me into *France*.

Mr. *Ser*

Mr. *Sergeant Gould.* Pray what Letter was that he brought you?

Captain *Porter.* He brought me a Letter, and ſaid, It was writ by Sir *John Fenwick* to King *James* on my behalf.

Mr. *Speaker.* Did he deliver that to you?

Captain *Porter.* No: he delivered it to the Gentleman that was to go with me, one Captain *Donelagh.*

Mr. *Speaker.* Why did you not take that Letter into your own Hands?

Captain *Porter.* I had it, and read it, before it was ſeal'd up.

Mr. *Sergeant Gould.* Do you remember the Contents of it?

Captain *Porter.* As much as I remember was, He deſired his Majeſty, by reaſon that my going away was to ſave my Lord *Aylesbury,* and my Lord *Mongomery, &c.* to pardon what I had done.

Mr. *Recorder.* Who ſubſcribed it?

Captain *Porter.* It was not Sir *John Fenwick*'s Name, but they told me, King *James* would know who it came from.

Mr. *Recorder.* How did you proceed after the Meeting with my Lady *Fenwick?*

Captain *Porter.* The next Night after that he had paid me my Money, and ſhewed me the Bill, and I was to go away the next Day after. They ſaid, the Boat was provided?

Mr. *Recorder.* Can you tell whether the Boat was provided?

Captain *Porter.* They were taken up preſently after.

Mr. *Sergeant Gould.* We will now produce a Record to confirm the Evidence that he hath given you. This Perſon hath been convicted for this Tampering.

Accordingly the Record of Clancy's *Conviction was produced.*

Sir

Sir *Thomas Powys.* I desire to know whether they offer this as Evidence against Sir *John Fenwick.*

Mr. *Speaker.* They offer it to prove, That this very Person hath been tampered with, to take off his Testimony, and they leave it then to the House to judge, who is most likely to be Guilty of *Goodman*'s withdrawing. They began to shew you, there hath been an Attempt to take off this Person's Testimony, you have heard the Person himself to it already. So now they offer to Read the Conviction of *Clancy* to this Matter.

The Record of Clancy's *Conviction was read.*

Mr. *Recorder.* We will prove the like Solicitation hath been made by Mr. *Dighton,* who is the Solicitor for the Prisoner at the Bar.

Mr. *Speaker.* What is your Witnesses Name?

Mr. *Recorder. Tho. Roe.* If you please, Sir, to ask him, what Endeavours have been used by Mr. *Dighton,* to make use of him, that *Goodman* might withdraw himself.

Mr. *Speaker.* Mr. *Roe,* You are required to give this House an Account of what hath passed between Mr. *Dighton* and you in order to take off the Testimony of Mr. *Goodman.*

Mr. *Roe.* About the middle of *September* last I had occasion to go to Mr. *Dighton,* to enquire, where the Commissioners for the Land Tax in *Surrey,* sat; for I knew he was concerned in some Affairs of that County: He told me, He did not positively know, but would speedily enquire. At the same Time, he took occasion to tell me, He knew it was in my Power to do Sir *John Fenwick* Service. I asked him, What he meant by it? Says he, I know you know *Goodman* well, and it will be the Better for you, if you will tell me: I asked him, What he meant by that way of Talking? He desired I would meet him some other Time, and I should know further of his Mind, Accordingly I did Meet Mr. *Dighton*: Says he, You know *Goodman* well, and if you can say

any

any thing that can Diſcredit *Goodman*'s Teſtimony you ſhall have 100 *l.* a Year ſettled upon you for your Life. Says I, Sir, I do know him well. Says he, Did you never hear him talk of Poyſoning the Duke of *N.* and Robbing on the High-way, and that he is concerned with Clippers? Says I, I have heard him talk of thoſe Matters ſeveral Times, but you can't think I will be a Witneſs, and expoſe my ſelf, and diſparage People, till I know for what. Says he, for that you ſhall be ſatisfied; you ſhall have 100 *l.* a Year ſettled upon you, provided you can diſcredit *Goodman*'s Teſtimony, that Sir *John Fenwick* may come off, and it will be done by a Friend of yours.

We accordingly agreed to meet the next day at a Coffee-Houſe in the City, and appointed a Friend to be there, but Mr. *Dighton* did not meet at that time, and the Reaſon he told me, was, becauſe Sir *John Fenwick* was that Day to be Arraigned. As ſoon as Mr. *Dighton* had made this Propoſal, I told Mr. *Goodman* of it, and he adviſed me to go on with him, and ſee if I could get any offer under his Hand: I told him, he had appointed to meet me in the City, and a Friend to be there to hear me, I went, and told Mr. *Dighton*, but Mr. *Goodman* would not be ſatisfied with that, but ſaid I muſt go to the Arch-Biſhop and tell him what paſſed; ſo I did go and tell the Arch-Biſhop what I have told you now.

Mr. *Speaker*. Had you any Meeting after that?

Mr. *Roe*. Yes, on the 19th of *September*, and then he made great Aſſeverations, that what he ſaid ſhould be performed; and that I ſhould not only oblige Sir *John Fenwick*, but my Lord *Montgomery*, and that *Goodman* was a loſt Man by being become a Common Evidence, and that it would not be in his Power to oblige any Man, my Lady Dutcheſs having Diſcharged him of his Employ, and he would not be in a Condition to do further for me; and ſays he, whatever you would have gotten by ſerving

my Lady Dutcheſs in her Concerns, ſhall be made up over and above this 100*l.* a Year that I have promiſed.

Mr. *Sergeant Gould.* I deſire he may be asked, Whether *Goodman* did not acquaint him, that a Siſter of Sir *John Fenwick*'s had been with him, and upon what Occaſion?

Mr. *Roe.* About the time of preferring of the Bill againſt Sir *John Fenwick*, I ſaw *Goodman* at *Hick*'s Hall, and a little after, he told me, that a Siſter of Sir *John Fenwick*'s had come to him, and made ſome Propoſals to him, and I acquainted the Duke of *Shrewſbury*'s Deputy Mr. *Vernon*, with it.

Mr. *Speaker.* Did you purſue this Diſcourſe with Mr. *Dighton*, ſo as to come to any poſitive Agreement?

Mr. *Roe.* No otherwiſe than what I told you. My Deſign was to have Mr. *Dighton* to have given it me in Writing, or elſe for him to have ſaid it before ſome other Man. But I don't know any thing whereby I could have diſcredited Mr. *Goodman*, if he would have done it.

Mr. *Sergeant Gould.* You obſerve, Sir, that one of the Witneſſes whoſe Name is ſubſcribed to the Bill of Indictment, is withdrawn: Now to give you an account that he is withdrawn, I deſire the King's Proclamation may be Read.

Members. No, no.

Mr. *Recorder.* We have Mr. *Goodman*'s Examination under the Hand of Mr. *Vernon.* We pray it may be Read.

Sir *Thomas Powys.* Mr. *Speaker*, I deſire to be ſpared a Word to this Matter: I take this to be a great Point, not only as it concerns the Life of this Perſon, but as it may be a Matter of Example in all times hereafter. That which they would offer, is ſomething that Mr. *Goodman* hath Sworn, when he was Examined by Mr. *Vernon*; Sir *John Fenwick* not being preſent or privy, and no opportunity given to croſs

Examine

Examine the Perſon; and I conceive, that cannot be offered as Evidence; for if that ſhould be allowed, then what is Sworn behind a Man's back, in any Caſe whatſoever, may as well be Produced as Evidence againſt him; and they know, that in a Caſe of the value of Five Shillings, no Depoſitions or Examinations of any Man can be made uſe of. I am ſure they will not ſay, that the Depoſitions taken between other Perſons, where a Man is not a Party, can be made uſe of as Evidence againſt him; and if not admitted where Property is concerned in the loweſt Degree, I hope you will never admit it in this Place, from whence Inferior Courts (as to Juſtice) take their Meaſures.

Sr. *Barth. Shower.* Mr. *Speaker*, I deſire you would ſpare me a Word of the ſame ſide. I humbly oppoſe the Reading of this Examination, as not agreeable to the Rules of Practice and Evidence, and that which is wholly new. In Civil Cauſes this can't poſſibly be done; no Depoſition of a Perſon can be Read, though beyond Sea, unleſs in Caſes where the Party it is to be read againſt was privy to the Examination, and might have croſs Examined, or diſcredited the Witneſs. But in Criminal Caſes, I Appeal to the Gentleman on the other ſide, who knows the Proceedings in the *Old-Baily* very well, Whether it was ever admitted as proof of Treaſon. Nay, in an Appeal of Murder, if Depoſitions be taken before the Coroner, or there be an Examination of Witneſſes upon an Indictment, though the Appeal be for the ſame Fact, and in Order to bring the Perſon to the ſame Puniſhment, yet in that Caſe thoſe Depoſitions can't be Read, becauſe 'tis another ſuit: Tho' in many Caſes the *Attorney* General, may for the King Arraign the Party, and Proſecute him, upon ſuch Appeal where the Appellant declines it, and tho' the *Statute* of *P.* and *M.* direct in ſome Caſes, that the *Coroner* and *Juſtices* ſhall return the Informations, and Examinations of the Witneſſes, to the Seſ-

ſions, yet that is not for Evidence to be read, but in Order to inform the Court, and give their Judgment as to Bailment, and other like matters. 'Twas never allowed that the Examination of Witneſſes behind a Man's back, ſhould be Read in any place whatſoever. Our Law requires Perſons to appear, and give their Teſtimony *Viva Voce*; and we ſee that their Teſtimony appears Credible, or not, by their very Countenances, and Geſtures, and the manner of their Delivery; and their Falſity may ſometimes be diſcovered by Queſtions that the Party may ask them, and by Examining them to particular Circumſtances, which may lay open the Falſity of a well laid Scheme; which otherwiſe without a nice ſifting of them might have paſſed for good Evidence, and this great Advantage we are deprived of, if this Examination ſhould be admitted to be Read.

Now, though the Practice of other Courts does not oblige this Honourable Houſe, yet we know you will Conſider the Rules of Juſtice; 'tis but Juſtice in Criminal Caſes, eſpecially as our Conſtitution is, that the Perſon ſhould ſee his Accuſer. A Man may Swear to a Depoſition reduced into Writing, whoſe Conſcience or fear of being falſified, perhaps would not let him Publickly Accuſe the Priſoner, Face to Face: Experience hath ſhewed it often, that ſeveral that will Calumniate another Privately, will not juſtifie the ſame in an open Court. What *Goodman* is, 'tis not proper for us at preſent to give an Account of, but we oppoſe it at preſent, for that we were not Preſent, nor Privy, nor could have croſs Examined him; What is deſired to be produced is, only an Information before a Private Juſtice; and then if ſo, Mr. *Recorder* knows, that in the *Old Baily*, if *Goodman* had died, it had not been Evidence: In caſe he had been Sick, or withdrawn without our Privity, they could not have Read it: Nay, if he were withdrawn by our Privity, it could not be Read there. 'Tis true, the inticing him to withdraw, had been puniſhable

ble in the Perſon attempting it, but could not have been Read to have Convicted the Party; and ſince this Examination could never have been Read there; becauſe not conſiſtent with the general Rules of Juſtice, I hope you will not admit it here.

Mr. *Speaker*, Mr. Sergeant *Gould*, what do you ſay to it?

Mr. Serg. *Gould*. I obſerve this Gentleman's Objection, why this Examination ſhould not be Read; and under favour, we think we are Regular, as this Caſe is, to have his Depoſition Read. 'Tis true, as long as the Witneſs can be produced in all Courts, and Practice of the Law, you ſhall not Read his Examination, or what is taken before a Juſtice of Peace; But that is not our Caſe. It is now fully proved before you, that he is withdrawn, and 'tis fully before you, that he hath given Evidence for the King, and hath been Examined, and this is an Extraordinary Caſe, and that is the reaſon we are in Parliament. He hath Sworn this Matter, and before a proper Officer, Why then ſhall not his Evidence be Read and Allowed, when he is wilfully withdrawn, and we ſay, by the Contrivance of the Priſoner at the Bar. And the Thing ſpeaks it ſelf. Now, with Submiſſion, I take it to be every Days Practice, that where a Witneſs is Dead, his Depoſitions ſhall be Read. It appears to you, that there was to have been a Tryal, but the Witneſs is withdrawn, and it appears plainly, that there hath been tampering. The Evidence is full, in the Caſe as to *Porter*; and we have produced a Record of Conviction, that does confirm it: Now this is ſuch a Practice, we come into Parliament to have it remedied; for otherwiſe Men ſhall commit Treaſon, and by their Contrivance and Art, the Witneſſes ſhall be drawn away, and the Perſon ſhall not be brought to Condign Puniſhment. Here is the Record upon which he gave Evidence, but ſince he is withdrawn; And therefore I hope, in this Caſe, we ſhall be admitted to Read his Depoſition, for I deny

what the Gentleman ſays, to be Practice. And Mr. *Recorder* can give you a better Account, who knows more of the Practice of it, That if a Witneſs is dead, they may Read his Examination. We are here before you in Parliament, and by the ſame Reaſons that others have been tampered with, this Witneſs may be preſumed to have been tampered with. And therefore we are in your Judgment, whether in this Caſe his depoſition ſhall not be Read?

Mr. *Recorder*. 'Tis Objected, on the other ſide, That this Evidence ought not to be offered, and for what Reaſon? Becauſe, ſay they, a Jury ought to go *Secundum Allegata & probata*; and what is not ſtrictly Evidence by Law, you are not to take notice of; but in Criminal Caſes (which is this Caſe) where Perſons do ſtand upon their Lives, Accuſed for Crimes, if it appears to the Court, That the Priſoner hath by Fraudulent and Indirect Means, procured a Perſon that hath given Information againſt him to a proper Magiſtrate, to withdraw himſelf, ſo that his Evidence can't be had in Perſon in that Caſe, his Information hath been Read. Which, I ſuppoſe, with humble Submiſſion, is this Caſe. But I ſuppoſe, we are not here tyed up to Formal Evidence. But 'tis our Duty, ſince the Houſe hath Commanded to lay the whole Fact before you to offer this, and you are Judges what is Material, and what is not Material.

Sir *Tho. Powys*. 'Pleaſe, Sir, to ſpare me a little; for ſure this is no ſmall matter. I did expect that they, if they had intended to have ſupported this Evidence, would have mentioned ſome Author, ſome Caſe, or ſome Precedent where this has been done before: — But he makes ſuch a Diſtinction, I am mightily ſurprized at; for Mr. *Recorder* cites no one Inſtance, that ever he ſaw ſuch a thing in his Life, nor cites one Book that hath ſuch Authority; but he gives you a Diſtinction, whether it be of his ſide or ours, I muſt ſubmit to you; for he ſeems to Agree, that in Caſes of Property, ſuch Evidence is not

allowed

allowed; but in caſes of Life, in which we ought to be more tender, he ſays, 'tis to be allowed. Sure, if it be not Evidence where Five Shillings only may be at Stake, I ſubmit it to you, whether it ought to be admitted in the Caſe of Life? For my part, I know nothing of it, if it be a Rule; but I always thought the Evidence ought to be more Clear and Full in the Caſe of Life, than in the Caſe of Property; but Mr. Recorder turns it upon us, and ſays, Though it is not Evidence in Caſe where Property is concerned, 'tis Evidence in Caſe of Life: But I deſire he will ſhew any one Lawyer in *England*, that ever ſaid it but himſelf.

Sir *Barth. Shower.* I Anſwer to what Mr. Sergeant *Gould* ſays, That this is an extraordinary Caſe: How far 'tis ſo I will not take upon me to ſay; But oppoſe it in reſpect of the Rules of common Juſtice. As to Mr. Recorder's Diſtinction between Civil and Criminal Cauſes; he hath admitted, that in Civil Cauſes it would not be allowed; and I hope you will be of Opinion, that it ought not to be admitted in Criminal. He ſays in Criminal Cauſes. The Jury muſt go *Secundum allegata & probata*, I deſire to know what other Rules a Jury hath in Criminal Caſes? Will they ſay, that a Jury-Man is not as much upon his Oath in Trying a Priſoner for his Life, as in Trying an Action of Treſpaſs? Is not the Oath, *You ſhall well and truly try*, &c. *according to your Evidence?* Now, I would know whether the Form of the Oath, which the Wiſdom of our Anceſtors have thought fit to uſe for 1000 Years paſt, be not the moſt proper direction to inform us what ſhall be Evidence? Evidence *Prima Facie* muſt be Evidence of Living Perſons: I am ſpeaking for the Life of a Man, and for maintaining the Rules of Law, which I hope ſhall continue for ever, and one of thoſe Rules is, that the Examination of a Perſon that is abſent, ſhall not be Read to ſupply his Teſtimony. What you ſhall think fit to do here, we muſt ſubmit to; but that 'tis allowed below, we muſt deny.

Mr. *Serg. Lovel.* Sir I do, with humble Submiſſion, ſtand to what I ſaid, As to the Definition of *Allegata & probata*, in matter of Property, we agree with them; but as to *Allegata & probata*, in matters Criminal, we muſt differ with them. I did ſay it before, and do ſay it again, with Submiſſion, That in many Caſes Criminal, there need no poſitive Evidence at all, and yet the Jury according to *Allegata & probata*, in that Caſe, may Convict a Criminal. And I do ſay with Submiſſion, That where there is no poſitive Proof at all, many Criminalls are, and ſtill will be Convicted. I did Inſtance before in the Caſe of Clipping and Coining; which are Matters ſo ſecretly Practiſed, as 'tis very rare, there can be any poſitive Witneſs to prove the Fact, What is then the Method? Why we go by Circumſtances, by Information of other Perſons, by Tools, and other Inſtruments that are found; and though no body ever ſee them do the thing, yet they are Convicted. We do not offer this Evidence to be as concluding Evidence, as if *Goodman* was here; but as Corroborating Evidence of what Captain *Porter* hath ſaid. If it did wholly depend upon this Evidence, it may be it might have no great weight; but ſince there is other Evidence *Viva Voce*, and ſince you have been pleaſed to Order us to lay before you all the Evidence, we humbly offer it to you, and pray it may be Read.

Mr. Manley. I humbly pray they may withdraw.

Mr. Speak. If you pleaſe, to withdraw. But firſt I am required to ask, if on both ſides you inſiſt upon this Point?

And the Counſel for both ſides Declared, they inſiſted on it. And then withdrew.

Mr. Manley. I ſhould not have preſumed to have given you this trouble of their withdrawing, but that a thing is inſiſted on by the Counſel for the Bill, which I think is of the greateſt Conſequence to all the Freemen of *England*. 'Tis true, the Rules of

Weſt-

Weſtminſter Hall are not binding to the Legiſlative Power; but I would not have the Legiſlative Power to be governed by the private Senſe of any Man whatſoever, but by thoſe Rules that are the Rules of Juſtice and Common Equity. God forbid that we ſhould, upon Suppoſitions, ſuppoſe our ſelves out of all the Rights of the Law. I never heard any Gentleman of the Long Robe, before the Learned Sergeant at the Bar, aſſert, That an Examination before a Juſtice of Peace, could be read againſt a Man for his Life. 'Tis known to all that have look'd into the *A B C.* of the Law, that it was never Practiſed. 'Tis true, in Equity, Depoſitions may be read, becauſe they are taken by the Conſent of all Parties; and 'tis as well a Depoſition of one ſide, as of the other, and the Witneſſes may be croſs examined. But that is nothing to this Purpoſe.

Mr. Sloane. I believe I may ſave you a great deal of trouble in this Matter; for thoſe Gentlemen from the Bar that made Objections ſpeak without Book, but I ſpeak by Book; No leſs a Man than my Lord Chief Juſtice *Hales* (and I think he was paſt his *A B C.* of the Law; I know not how far this Gentleman is advanced) in his Pleas of the Crown, in that part where he ſhews what is Evidence to the Petit-Jury, He ſays,

Having my Lord Chief Juſtice Hale's *Pleas of the Crown in his Hand.*

Firſt, By the Statute 1 & 2 *Phil.* & *Mary.* c, 13. 2 & 3 *Philip*, & *Mary* c. 12. The Juſtice hath Power to Examine the Offender, and Informer, and ſo he goes on in ſeveral particulars: And then 5. He ſays, *theſe Examinations, if the Party be dead or abſent, may be given in Evidence.* I muſt allow, ſuch an Examination not of the ſame Authority as if the Witneſs was preſent it would be, becauſe he can't be croſs Examined, but ſtill it is of ſome Weight, and it muſt be read. But in this Caſe, 'tis of greater weight than in that which my Lord Chief Juſtice puts; for he ſays, it would

would be Evidence, if the Party was dead, or if he was withdrawn without the Conſent of the Party againſt whom he is a Witneſs, and that comes to the Caſe in Chancery, every day practiſed; That if any Perſon gets my Deeds and Evidences into his Hands, and he hath Imbezled the Deeds, they ſhall be preſum'd to be what I alledged, becauſe 'tis his Fault he does not produce them. So this withdrawing by the Inſtigation of Sir *John Fenwick*, is a ſtrong Preſumption, that what he Swears againſt Sir *John Fenwick*, is true.

Sir Rich. Temple. No man can give Evidence of any Depoſitions, nor was it ever admitted to be Evidence either upon the Party's Death or Abſence; and I would not have that Doctrine paſs, that We are not tyed to the Rules of Law. My Lord Chief Juſtice *Vaughan*, when he was of this Houſe, told us, we were not bound to the Forms of Law, but we were tyed to the Rules of Law; and if you are not, How will you judge of this Crime? How will you judge it to be Treaſon. In the worſt of Times, In the Tryal of my Lord *Mordant*, who was Tryed before the High Court of Juſtice, they would not allow of this piece of Evidence, tho' they had thrown aſide Juries. We are tyed by the Rules of Law, or we are tyed by nothing.

Sir Tho. Littleton. The Worthy Member here tells us, We are tyed by the Rules of Law, or we are tyed by nothing. I hope he does not intend to put the Pun upon us, that was by a Noble Lord. You are tyed by Rules or no Rules; if you are tyed by no Rules, What Rules are you tyed by? I think you may act by Rules, and yet Admit of this Evidence. I told you before, I ſhould not reckon my ſelf ſo tyed by the Rules of Law, but that I would hear all Evidence that ſhould be offer'd; and I do not think 'tis for our Honour to ſtifle any thing that may bring out the Truth. A worthy Lawyer ſaid, Let them produce one Evidence that is of the

Recorder's

Recorder's Opinion; and a Member hath produced the Opinion of my Lord Chief Juſtice *Hales*: And I hope we ſhall not be debarr'd from the Satisfaction of Hearing what they might hear in the Courts below. Here are two Witneſſes that have been examined againſt him, which the Jury did believe that found the Bill. If we can't have theſe two Witneſſes, let us have as much as we can. We have heard what one ſaid: We have an opportunity of knowing what the other ſaid. No, ſays the Gentlemen, We do not deſire to be Inform'd, but I believe it muſt come to that at laſt.

Sir Rich. Temple. The Gentleman that ſpake laſt, inſinuated, as if I had dropp'd ſomething he could not underſtand, Give me leave to tell you, There was the Court of the Preſident of *Wales*, when they urged Rules of Law, then they were a Court of Equity; and when they Argued from Points of Equity, then they were tyed up by the Rules of Law: And ſo gave Judgment neither according to the one nor the other, and ſo it was taken away by Act of Parliament.

Mr. Boſcawen. I have ſeen it my ſelf, that a Juſtice of Peace has been examined himſelf, as to Depoſitions he had taken, and I take it to be an ordinary Examination.

Mr. Harcourt. Sir, I muſt ſay, if you were to pick all the Abſurdities out of the Tryals in the late Reigns, you could not pick out more than have been endeavoured by the King's Counſel to be impoſed upon you this Day: This does in ſome meaſure convince me, of what was ſaid by another Gentleman the other day, That it is much better to be tryed by an Aſſembly of 400 Gentlemen, than at the *Old-Baily*. There was a Quotation of a Learned Author, and the Gentleman read you what was Evidence, and what was not. And the Concluſion was, That theſe Depoſitions, if the Party was Dead or Abſent, is Evidence. Why Sir, if theſe Depoſitions be Evi-

dence

dence if the Party be Abſent; then what are we doing of? If that be a certain Rule, there is no manner of need of Applying in this Extraordinary way; but if you pleaſe to enter into the Conſideration of what is propoſed to you for Evidence (I am neither afraid, nor unwilling to be informed.) If Gentlemen will take it, *De bene eſſe*, For better for worſe, with all my Heart; I will freely tell you my Opinion of it.

Sir Edw. Seymour. It hath been made a Queſtion, How far you are bound to purſue the Rules of Law? I ſuppoſe it is no new Thing I am a going to ſay, That Bills of Attainder, and Judgments of Attainder, have been reverſed for no other Reaſon, but becauſe the Parliament have not proceeded according to the Rules of Law. I will not ſay, you are bound by the Rules of inferior Courts, but you muſt be bound by the Rules of Parliament, and by the Proceedings and Practice of Parliaments, which is the Law of Parliament. And then I would know, whether ever this Houſe did admit of an Affidavit for Evidence? And the reaſon is this, becauſe by that you make this, which is the ſuperior Court, lame, without the Aſſiſtance of an inferior Court.

Mr. Geo. Rodney Bridges. The Matter before you is, Whether Sir *John Fenwick* be Guilty, in your Judgments, of this Conſpiracy? And if ſo, I can't imagine why you ſhould not take all the Information that is offered to you, and not hear all the Circumſtances of it. If you do not read this Affidavit, I do not ſay but 'tis a kindneſs to Sir *John Fenwick*, but what kindneſs will it be to the Country and Government?

Mr. James Mountague. I hope you will not ſpend much more time about this, becauſe the Law is ſo plain: If there be any Thing in the Objection, 'tis this, That if it be Evidence, the Courts below may proceed upon it: But that I take to be no Objection neither; for though it is Evidence, there are not

not two Witneſſes, and the Courts below require two Witneſſes, ſo though there be this Evidence, and one Witneſs beſides, yet you can't try him for Treaſon in *Weſtminſter-Hall* without two Witneſſes. It would be admitted in the Caſe of Felony, and would be ſufficient where two Witneſſes are not required expreſly by the Law. And I can tell you, upon my Reputation, I have ſeen it done ſeveral times. The Learned Gentleman tells you that my Lord Chief Juſtice *Hales*'s Opinion is ſo, and that is grounded upon an Act of Parliament, and I think that is of greater Authority than any Judge's Opinion, and therefore I think that Objection will vaniſh. The Honourable Gentleman at the Bar ſays, You have no Authority to receive Affidavits, but ſure we may take Notice of Acts of Parliament; and if that requires Depoſitions to be taken, and to be certifyed to the next Seſſions and in order to be Evidence againſt Criminals, we ought to take Notice of it, ſo that what the Law makes to be Evidence will be good in this Place.

Mr. Harley. I look upon this Matter under your Debates to be of the greateſt Conſequence to the Lives of the Subjects of *England*, that poſſibly can come before you: Gentlemen have given you ſeveral Reaſons for reading theſe Depoſitions; one, that it was my Lord Chief Juſtice *Hales*'s Opinion; another, that there is an Act of Parliament for it: Now, I think, it would be proper to join Iſſue in theſe two Points, If any Act of Parliament can be produced for this, then the Debate will be at an end; but if there be an Act poſitive againſt it, then I hope you will not receive it: And if my Lord Chief Juſtice *Hales*'s Book, have not one Word relating to this, then I hope that will be no Argument. He begins his Chapter *of Evidence*, and ſays, That the Evidence to the Jury, in Caſes of Treaſon, muſt be two Witneſſes; and then comes to the Caſes of Felony: But is that any Debate before us? And he tells you,

That

That Informations might be taken of the Perſon himſelf, but that was not by the Common Law, but was allowed of by particular Acts of Parliament; and then tells you, That his Information, and Depoſitions before the Juſtice, were to be admitted, (but he was to be by:) But is this any Thing to lead you? Have they brought any Statute that tells you, there muſt not be two Witneſſes in this Caſe? If you will take Notice of a Statute, you muſt take Notice of a Statute that is in point. If any Man ſuffers by one Witneſs, I believe all the World muſt ſay, he ſuffers unjuſtly: I think 'tis of the greateſt Conſequence to admit of Affidavits. Here it is, that the Boundaries are eſtabliſhed for the Lives and Liberties of Mankind: And this is an Obſervation that is found in Hiſtory, That thoſe that have broke their Bounds down, it hath returned upon them to their Prejudice. Let us not out of hatred or Zeal againſt a Guilty Man, looſe our own Innocence.

Sir *Rob. Rich.* I am ſure now we are not upon the Point of Reading, whether it be much or little, but upon the Point of Hearing, and that I ſpeak to. And, I think, the Gentleman near the Table, did not miſtake what the Bar ſaid; for the Counſel on the other ſide inſiſted poſitively, That neither by the Practice, nor by the Books, was a Depoſition to be read as Evidence: Againſt that, the Gentleman near the Chair produced that Book. As to the matter of Treaſon, every Parliament Man can remember, that you have made an Act, That there ſhall be two Witneſſes in Caſes of Treaſon. Now, at the ſame time, it will be taken Notice of, that you have taken Care in that Act, That the Proceedings of this Houſe ſhall not be tyed up by it. The Gentleman tells you, of a Court that wavered between Law and Equity, and ſo came to nothing, and I am afraid, if we bring the Houſe of Commons down to the Courts of *Weſtminſter-hall*, they will make nothing

thing of us neither: I do not ſay, That this Paper ſhall be as ſtrong Evidence as if *Goodman* was at the Bar, but to ſay, it ſhall weigh nothing, I can't agree neither. I agree alſo to make a common Practice of reading Affidavits, will be of ill Conſequence; And if you take this to be a matter of ſmall Conſequence, I am not for reading this Affidavit now. I aim not at Sir *John Fenwick*'s Blood, but the Safety of the King and Government. And I would not refuſe any Evidence in this Caſe, be it never ſo ſmall. Theſe Gentlemen ſpeak againſt a matter being Evidence before it is read, 'tis offered as Evidence, if it be ſmall, or come to nothing, it is the better for the Priſoner at the Bar.

Mr. Pelham. I am indifferent whether I hear that Paper read, or no, but what is ſaid by a Learned Gentleman ſtartles me; ſays he, In *Weſtminſter-hall* they are bound to the Evidence of two Witneſſes, and there this Evidence would not be proper, but here we are upon another Foot. I hope we are not here upon another Foot, though here, we are not to be tryed by the *Chicanry* of the Law, we are to be tryed by the Equity and Subſtantial part of it. I deſire to know, if any one can be tryed for Treaſon upon one Witneſs? And if we are not tyed by the Rules of Law, we may as well ſay we may hear any Evidence whatſoever, and if the King's Counſel thinks it may ſatisfy your Fancies, it muſt be received.

Lord Cutts. I conceive, Gentlemen, we are out in the way of Arguing. I muſt put you in mind that we are at the Bottom, only arguing againſt the Juriſdiction of this Houſe; and though that Matter hath been ſettled before, we are told very often of the Law, and Rules of *Weſtminſter-hall.* In anſwer to that, I muſt obſerve there are ſeveral Sorts of Laws, there is the Law of Nature, the Law of Nations, the Law of God, and there is the Legiſlature, and 'tis a Self-evident Maxim not to be contradicted,

That

That no Superior is to be Circumſcribed by an Inferior. And I would ask, If the Courts below are not inferior to the Parliament? There is nothing can Limit us, but the Law of Nature, the Law of God, and the Law of Parliaments; and though I cannot tell you very well what is the Law of Parliaments, yet no Gentleman hath ſaid any thing upon that Subject, that is, againſt the Queſtion before you. The Matter was in a Courſe of Law, but upon an extraordinary Accident, and for extraordinary Reaſons, 'tis brought before you. The Accident is the withdrawing of a Witneſs, the Reaſon is the Securing of the King, the Government, your Selves, and Poſterity. I don't think any Man that hath ſpoke againſt it, is for favouring Sir *John Fenwick*, for I think this is the worſt way. I would appeal to every Man, what Prejudice 'tis to you to hear this Paper read. And it may be a Diſadvantage not to hear it.

Mr. *J. Howe.* There have been many Arguments given for and againſt the Reading of this Paper, and if I did not think that the Reading of it could be of no uſe to the Judgment we are about to make, I ſhould be for the Reading; Either it amounts to a proof of *High Treaſon* againſt Sir *John Fenwick*, or it ſignifies nothing to you. If it be intended to weigh any thing, I can never agree to the Reading of it; for it is only a Hear-Say, brought to Convict a man that is tryed for his Life. But there has been one thing often urg'd which ſeems to weigh more than all the reaſons offer'd; and that is, your Enemies will have an Advantage, and your Government is at Stake; I don't take that to be ſo much an Argument of the Strength of the one, as of the Weakneſs and neglect of the other. But however we ſit not here to Patch the failings of the one, by an unwarrantable proſecution againſt the others. As to Sir *John Fenwick*, though he ſhould not be a good Engliſh Man, yet his Cauſe may be the Cauſe of a good Engliſh Man. The Queſtion is, *Whether there be more Danger*

to

to the Government, by the Withdrawing of a Witneſs, and the Eſcaping of Sir John Fenwick, *or to us and our poſterity, by the withdrawing of a Witneſs, and the Convicting of Sir* John Fenwick *for that Reaſon.* They give *Goodman* his full freedom, he is gone, and now they pretend, the Fate of the Government to depend upon his Teſtimony. The Precedent is not much to be feared; for, I ſuppoſe future Governments will take Care, if they think fit to uſe, at leaſt not to let ſuch a Witneſs goe about the Streets at Liberty. But it may happen, that certain Men, (for aſſerting the Liberties of their Country in this Houſe) may be Run upon by ill Governments, and attempts made upon their Lives by falſe Witneſſes. Indeed the Bill of Treaſon provides, That no perſon ſhall be condemn'd without two Witneſſes. We all know two indifferent ones will ſerve a Grand-Jury, nothing is ſo eaſie as to get a Bill found by them; yet nevertheleſs before a Petit Jury, one of theſe Witneſſes may be ſo notoriouſly Infamous, as not to be fit to be produc'd; The only way to hang the Perſon ſo proſecuted will be then to Convey that Witneſs away, and urge this Precedent for a Bill of Attainder: A moſt dangerous one it is, and ſuch a one as I think it is the Intereſt as well as duty of all true *Engliſh* Men to oppoſe.

Mr. *Smith.* I think we are come to the Debate of the Bill, inſtead of Reading this Paper. Was the Queſtion, *Whether this Paper ſhould be allowed as a ſecond Witneſs?* then it would be a great Queſtion with me, *Whether it ſhould be Read?* But the Queſtion, as to Colonel *Sidney, was not whether the Paper ſhould be Read, But whether it ſhould ſupply the place of a ſecond Witneſs?* Your Debate is Extraordinary; your Bill takes notice of *Goodman* being gone away, and now you won't take notice of what he hath left behind him, which I ſhould the rather be ſatisfied in, becauſe I ſaw a Gentleman Soliciting at the Bar, that did endeavour to get him away. If *Goodman* had been brought a Priſoner to the Bar, I do not know,

whether that might not have been reckoned as great a fault, as now his having too much Liberty. It hath been cited as a great Lawyer's Opinion, That his Examination might be given in Evidence; but he does not ſay what weight ſhall be laid upon it.

Mr. *Pelham.* I am ſorry that Honourable Gentleman miſtook me ſo much, I thought I had ſpoke very plain, I told you, I was not againſt Reading of that Paper, till the Learned Gentleman told you, You were not tyed up as the Courts of *Weſtminſter* Hall, to two Witneſſes. As to what I ſaid of Mr. *Sidney's* Caſe, it was not againſt Reading that Paper, but I ſaid, he did rely upon it as againſt Common Juſtice, to be Attainted by one Witneſs (And that Attainder you have thought fit to Reverſe.) And the Reaſon he gives for it, was, becauſe it was impoſſible for a Man to make any Defence againſt one ſingle Witneſs.

Mr. *Att. Gen.* The Matter you are now Debating upon, is, Whether theſe Papers ſhould be now Read. And Gentlemen have let themſelves into a Debate foreign to the Queſtion. A great many are againſt it upon this Argument, that they would not be of Opinion to Condemn him, unleſs there were two Witneſſes: That is not now the Queſtion, for I think no Man is ready to give his Opinion to Condemn or Acquit him. One Gentleman is againſt the Reading of it, and yet believes Sir *John Fenwick* Guilty. I muſt reſpite my Judgment, till I have heard his Defence. I think that the Councel for Sir *John Fenwick* at the Bar, are very much miſtaken, when they ſaid, That ſuch a Thing as an Examination in Writing, was never Read in any Court of Juſtice, I think that is a great miſtake, and a good Authority hath been Cited for it, and every one knows the Practice is otherwiſe. 'Tis often allowed, That the Examinations before a Juſtice of Peace are Read. The Queſtion is now, *Whether this Examination ſhall be Read?* If there do not appear another Witneſs to prove him Guilty, you will Debate that Matter then, Whether you

you will Condemn him without two Witneſſes? You might as well have Debated before, Whether *Porter* ſhould be Examined, becauſe no Man will Condemn him without two Witneſſes, and therefore do not Examine one. Why, we know not what further Witneſſes may be produced. If Sir *John Fenwick* was upon Tryal, I think this Information might have been Admitted for Proof, if *Goodman* was out of the way; but if it was Admitted, unleſs there was another Witneſs produced, I believe the Court would tell the Jury, Here are not two Witneſſes, and therefore you muſt Acquit him.

Sir *W. Coryton.* I muſt crave leave to differ from that Worthy Gentleman; I think this is the proper time to Determin, Whether this Evidence is to be admitted. Afterwards indeed you may determin, how far 'tis available. I thought, both in Law and Juſtice, before I came into the Houſe, That this ought not to be admitted for Evidence. A Gentleman grounded his Argument; upon what? My Lord Chief Juſtice *Hales's* Opinion; but the fact is, that my Lord Chief Juſtice *Hales* States the Difference in Caſes of Treaſon, and in Caſes of Felony. Now in Felony, they make uſe of Depoſitions; and the Reaſon is, becauſe 'tis more for the Advantage of the Priſoner than his Diſadvantage; for if the Witneſs differ from his Examination before the Juſtice of Peace, that turns to the Advantage of the Priſoner. In the Nature of the thing, It ſeems not to be Reaſonable, for it is eaſie to turn the Tables. And ſuppoſe *Goodman*, in the place of Sir *John Fenwick* and Sir *John Fenwick* in place of *Goodman*; it would be hard (take the Informations to be as they are) to Admit them for Evidence; which in my Opinion, are great Reflections upon Perſons of great Honour and Worth.

Sir *Chr. Muſgrave.* That which I conceive to be your Debate is that upon which the Councel withdrew, You heard it aſſerted, That there was no Inſtance in a Criminal Caſe, where an Affidavit was

allowed for Evidence: And I think the Learned Councel at the Bar, did not much inſiſt upon it, and yet I don't think they were Ignorant of the Caſe quoted out of my Lord Chief Juſtice *Hales*, but I ſuppoſe they thought it was not applicable to this Buſineſs before the Houſe. But only related to Felonies, and when Depoſitions were taken in the Preſence of the Party. 'Tis ſaid, we are not tyed up to the rules of *Weſtminſter* Hall, and that Parliaments may Denominate Crimes after they are Committed; but I never did hear that the Parliament did take upon them to Determin that to be Evidence which is not Evidence in any Court in the World. If you Read this Paper to inform your ſelves, you Admit that to be Evidence, which is no where elſe to be Admitted. You are told, you are not tyed to the rules of inferior Courts of Law, nor Equity, If you are not bound by them, you are bound by your own Conſtitutions. You are told, you are not uſed to Read affidavits in Common Caſes, but if my Memory ſerves me right, you have always had it oppoſed in this Houſe. Therefore I think, according to the Rules of your own Houſe, we ſhould not Read affidavits. Will you make a new Rule in this Caſe? Pray conſider the Conſequence of it hereafter. Suppoſe there come down Affidavits upon another occaſion, againſt a Great Man for High Treaſon, Whether that may not be thought ſufficient for to Govern your Judgments? I hope thoſe that hear me, will have a Care of that Matter. Why, by the Parity of Reaſon, may not two Affidavits do by the help of the Legiſlative Power? I would be glad to know, whether in the Caſe of an Impeachment, any ever heard of Affidavits being Read? And this is much in that Nature. And therefore, why ſhould you admit of an Affidavit now, when the Party Charged was not preſent, when that Affidavit was taken?

Sir *Joſ. Williamſon.* I am ſorry this Point coſts us ſo much time. The Gentleman that ſpake laſt, hath brought

brought us to the Queſtion, How far you will admit this Affidavit (as they call it) to be Read. I am of Opinion notwithſtanding all that hath been ſuggeſted, that it not only may be Read, but that it ought to be Read. None of the Caſes that have been inſtanced, comes up to the Caſe in Queſtion. All the Caſes that are brought, are from inferior Courts, and the laſt that is brought, is from the Example and Uſage, in leſs conſiderable Caſes, and indeed of a different Nature.

This Bill of Attainder, is a thing ſo extraordinary (as hath been ſaid) as it never ought to be uſed but upon extraordinary Occaſions, and upon that Principle, all that is feared is all anſwered and avoided. It is to be thought never to be made uſe of, but upon the like Occaſion, and then God forbid, but we ſhould be Governed by the like Precedent; and if that was proper to ſpeak now, which will be, when we come to give Judgment, and we have time to conſider of it, I can't think we ſhall differ in many Voices. Whether it be Evidence, and how far it is ſo, is not now the Queſtion, but the Queſtion is only, *Whether it be ſuch an Evidence as ought to be Read?* And all the inconveniencies that have been alledged, depend only upon this, that it ſhould not be admitted in the ordinary Proceedings in the Courts of Juſtice. Now I ſay, there was a Power lodged in the Parliament of *England*, to make a Man Guilty of Treaſon, that was not ſo before, and that even in a Reign, when they came to Determine what Treaſons were. They did not think it for the ſafety of the Community of Mankind, but that there ſhould be a Power lodged in the whole, to Declare that to be a Crime, that was no Crime before it was Committed, giving them more than is asked here: For here can be no Queſtion, but as to the Forms of Proceedings. The Queſtion is not upon his Crime, that is no Queſtion; and I take it, that if upon any Occaſion, 'tis to be juſtify'd in this, and the Law

hath truſted the Parliament with a greater Power than now they are about to Execute, and there are only Objections to it raiſed from another place, which I think can never conclude in this.

Mr. *Chanc. of the Exchequer.* I am for Reading of this paper, though I don't think it Evidence equivalent with *Viva Voce*; nor do I think, that in like Caſes it ought to be Admitted below. But I think, in your Proceedings in Parliament, it ought to be Read, whether it be an Affidavit or not. And I am the more of that Opinion, from what happened in a Caſe to Day. We had a Diſpute, Whether *Porter* was to be Examined, becauſe the Teſtimony of a Man's Wife was not good below? But when that came to be Examined, it was not the Teſtimony of a Man's Wife, but his own Letter appeared in Evidence; and *Clancy* told *Porter*, he came from *Fenwick* himſelf, and therefore the Evidence which at firſt, for that Reaſon, was urged not to be Heard, did amount to more when it came to the Proof. I would have this Paper Read, not becauſe it ſhould ſupply the place of a Witneſs. No, but becauſe you ſee he hath been Indicted by the Evidence of *Goodman* and *Porter*, and the firſt is withdrawn, and by whoſe Means you have heard, and I would know, Whether *Goodman*'s Evidence did amount to Accuſe him of the ſame? I do ſay, in your Power of Judging, you are not conſtrain d to the Rules of *Weſtminſter* Hall. And I would ſay, that for your Conſtitution, the Courts of *Weſtminſter* Hall, are to be Governed by the Letter of the Law; but there is lodged in the Legiſlative, a Power to judge thoſe Crimes that are ſheltred behind the Law. And I believe if the ſeveral Attainders were Examined, there was never any Attainder that went upon a more juſt Proceeding than this. I take the Crime to be a Plot with your Enemies, to bring in a foreign Power, and as if that was not ſufficient, he hath made a Falſe and Scandalous Confeſſion, to bring a Diſtruſt

ſtruſt and Jealouſy between the King and his People, and he hath dallied and gain'd ſo much time, as he hath had an Opportunity to corrupt one of the Witneſſes, and therefore it would be hard, if no Law ſhould reach him. 'Tis ſaid, Why did not you keep the Witneſs? It would be hard, after a Perſon hath made a Confeſſion for the good of the Kingdom, that he ſhould be always kept in Irons. We are debating of the Bill, while we are now only, purely to ſee what is in this Paper. I ſhould not if read, have made uſe of this as a ſecond Witneſs, but the being an Affidavit or not, is not material in this Point; The Commons proceed upon Impeachments, without Affidavits. 'Tis offered as Evidence, That *Goodman* was a Witneſs againſt him (you have had proof of;) and that he hath been Tampered with, to withdraw, by the Friends of this Gentleman. I do think we have gone more fairly and equally to work, than upon any of the Records of Attainders in your Journals.

Mr. *Brotherton*. The Queſtion is, Whether this Paper ſhall be Read? Firſt, it hath not been proved before whom it was taken, nor nothing at all. It hath been objected, That there ought to be two Witneſſes, by the late Statute. But I muſt put you in mind, that it was ſo by the Statute of *Edward* VI. and ſo was the Common Law before; and my Lord *Coke* ſays, there muſt be two Witneſſes, and they brought face to face, and ſo goes to the Divine Law; And if it ſhould not be ſo, I will put you in mind of an Inconveniency. Eleven Witneſſes were produc'd before a Grand Jury, and when they came to give Evidence, face to face, before the Petit Jury, the firſt Witneſs did not know the Criminal that he had Sworn againſt. It was in the Caſe of Sir *Rowland Stanly*.

They mention a Paper againſt *Algernoon Sidney*; but that Paper was wrote by himſelf. 'Tis ſaid, this Houſe are not bound by the Rules of other Courts; for that Reaſon, they ought to give Rules to other

Courts. Nothing is more common, than to ſay Judgment was ſo in the Houſe of Lords, and that ſettles the Law in other Courts below.

Sir *Godfrey Copley*. Several Gentlemen have ſpoke to the Reading of this Paper; which I cannot agree to, ſome have ſaid, That it ſhould be Read as Evidence; others are for the Reading of it, and at the ſame time tell us, it is not to be looked upon as Evidence, at leaſt not Equivalent to a Witneſs; If the Paper is to be Read, I would know for what Reaſon, for if it be not intended to Sway or incline our Judgments, then I take the Reading of it to be of no uſe at all; But on the other hand if it is deſigned as a Motive to ſway me, then I ſay it comes in as additional Evidence, and to ſupply the defect of another Witneſs, and the dangerous Conſequence of ſuch a Precedent deſerves your Conſideration.

I do very well underſtand that the Court of Parliament takes no Precedent from *Weſtminſter* Hall. Nor am I much afraid of any Precedent they ſhould give to *Weſtminſter* Hall, but it is very natural to ſuppoſe that one Parliament may take Precedents from another, and therefore I am afraid this ſhould be a Precedent to future Parliaments; Give me leave to ſuppoſe that any malicious knave ſhould hereafter Start up and Swear Treaſon againſt any of thoſe Honourable perſons who are accuſed in Sir *John Fenwicks* Paper, might not that very Paper according to our Method of Proceeding, be turned into Evidence, and made uſe of inſtead of a ſecond Witneſs, to convict them though never ſo Innocent?

Sir *H. Hobart*. I muſt differ with the Gentleman that ſpake laſt. As to the Gentleman that ſpake before, I did not expect any thing to be quoted out of *Lancaſhire* againſt the Reading of it. I will tell you why I think this Paper ſhould be Read; you have it ſuggeſted in the Bill that *Goodman* was one of the Evidence againſt Sir *John Fenwick*; they are to make good the Suggeſtions, and this will ſhew,

That

That *Goodman* was an Evidence. You are told the Danger of the Precedent, and there may come ill Reigns, and ill Parliaments; as to that, I ſhall only ſay, in a good Reign, and a good Parliament, there is no Danger; and in an ill Reign, and in an ill Parliament, they will make Precedents without your giving of them. Mr. *St. John* tells you in his Arguments, 'Tis true in inferior Courts, by the Statute of *Edward* the VI. they are bound by two Evidences *Viva Voce*; but you are not preſcribed by that here, but you are to Judge in your own Conſciences as the Thing appears: I may ſay as another did upon another Occaſion, Let it be Read; *Valeat quantum valere poteſt.*

Sir *Marm. Wyvell.* I deſire to take notice of one Argument, that hath been made uſe of by one or two Honourable Perſons; which is, They tell us, that *Goodman* hath been tampered with by Sir *John Fenwick*: I remember no ſuch thing that hath been proved; but indeed it was ſaid, That Mr. *Digton* offered Mr. *Roe.* 100 *l.* a Year, to invalidate Mr. *Goodman*'s Teſtimony.

Ld. *Caſtleton.* Let me ask you this Queſtion: *Whether if you Read this Affidavit you Read it as Evidence?*

Mr. *Sol. Gen.* I deſire you will conſider what you did before. You Ordered Captain *Porter* to go on with his Evidence, and did agree you would conſider of it afterwards, whether it was Evidence or not. Some are for Reading this Paper, and others are indifferent, whether it be Read or no; and thoſe that are againſt Reading of it, are againſt reading of it becauſe 'tis no Evidence: But that is no Reaſon why you ſhould not Read it; for it is at moſt, but doing a vain thing.

I think you have been told already, If a thing of this Nature was inſiſted on in the Courts below, It muſt be Read; the Court might ſay, 'tis not material, but if it was Inſiſted on it muſt be Read, and the other ſide muſt demur to it, and it muſt be Read

before

before they can Demur: So that the Queſtion, Whether it is Evidence? Muſt come afterwards; and if you go according to the Rigour of the Law, with Submiſſion, it muſt be Read.

Mr. *Price.* I did not deſign to trouble you in this Matter, but the Doctrine laid down by ſome Men of our Gown, ſurprizes me: 'Tis only an Averment, That the Court below ought to Admit this Paper to be Read, but there is no Precedent ſhewed, nor Convincing Reaſon given, why the Courts ſhould Admit it. The Queſtion is, Whether an Information taken before a Juſtice of Peace, ought to be Read here? If it be to introduce a New Law, and make a New Crime, then you may make a New ſort of Evidence: But if this be a Crime againſt an Act of Parliament, or Law in being, then you muſt take the Evidence the Law doth afford you according to the nature of that Crime. The Charge here, is a Charge of Treaſon againſt a known Law: But the great Argument is, This is an Extraordinary Offence, that Sir *John Fenwick* or his Lady, had a hand in ſending *Goodman* away: 'Tis a miſtake; and offering one thing that is not Evidence, brings us to another; As to the Evidence of *Clancy*'s tampering with Captain *Porter*; Captain *Porter* does not ſay, that Sir *John Fenwick* Employed him; only that *Clancy* ſaid ſo, which is but a Hearſay, and that is no Evidence, unleſs *Clancy* was at the Bar, and would ſay it himſelf.

In the next place, it is ſaid, That there was a tampering by a Solicitor: What is that? Is it not natural for a Solicitor to ſay, Is there any Objections to ſuch a Witneſs? Is it not natural for him to leſſen his Reputation if he can? Now you would have a Copy of an Information to be Evidence. 'Tis ſaid, 'tis *tantamount*: If ſo, then the Courts of *Weſtminſter* Hall ought to intermeddle with it, and not this Houſe. A Noble Lord mentioned to you the Law of Nature, the Law of Nations, and the Law of God, but he forgot one Law, which

was

was moſt Material, and that is Martial Law, which if he had ſaid, does juſtifie the taking away a Man's Life upon extraordinary Evidence, he had ſaid right.

Mr. *Speaker*. The Queſtion is this, *That the Information of* Cardel Goodman, taken upon Oath, 24*th* of *April*, 1696. be Read?

Which Queſtion being put, the Houſe divided.

Ayes, 218. Noes, 145.

So it paſſed in the Affirmative. And Sir *John Fenwick*, and the Councel, and Sollicitors on both ſides, were called in again.

Mr. *Speaker*. Gentlemen, ſince you withdrew, the Houſe have conſider'd of the Matter, upon which you did withdraw, and they have thought fit, that the Information of *Cardel Goodman*, taken upon Oath, before Mr. *Vernon*, 24*th* of *April*, 1696. be Read.——Clerk, Read it.

Cl. of the H. of Com. Reads —— This is Signed, *Cardel Goodman*, and Sworn 24*th* of *April*, 1696. before *James Vernon*.

About ſome two Years ſince, or better, I underſtood that Col. *Parker* was Reſident here, in Order to Engage ſeveral People for the ſervice of King *James*; and Captain *Porter* told me, he had a mind to ſee me, which he accordingly did; where he told me, there would be an Invaſion, and that King *James* would be Reſtored; and that in Order to it, he had a Commiſſion to Levy Men, and to Grant out Subordinate Commiſſions for a Regiment of Horſe, and did ask if I would accept of one, which I accordingly did. He likewiſe ſaid, he would ſee me as often as he could; and that Captain *Porter* and I ſhould receive Directions from him, from time to time upon ſeveral Meetings; and having received my Commiſſion, I underſtood what Captains were to be in the Regiment; which were Captain *Porter*, Sir *William Perkins*, Mr. *Charnock*, Sir *H. S.* Mr. *H.* and my ſelf; and one Mr. *W.* to be Lieutenant Colonel.

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The Commiſſions were to be Blank when they were to be delivered, and to be filled up by the Captains, *&c.* I then came Acquainted with Mr. *Charnock*, and Sir *William Perkins*, and by them and *Parker*, Captain *Porter* and I were Informed, That there was a great Body of Horſe to be ready in the North; but though I asked, yet they never named any Perſons to me, but ſaid, it was ſufficient I ſhould receive Orders, and a Roll to March, to Rendevouz upon Occaſion; and indeed I did not much preſs it, becauſe I did gather there were a great many Concerned; and at this time, Captain *Porter* and I took a Houſe in the *Chaſe*, with Stables and Barns, fit for holding Horſes, and as a fit place to meet, upon Orders given us to March, which were then daily expected.

Sometimes after this, Colonel *Parker* was taken, and being Committed to the *Tower*, he made his Eſcape; and after that, I ſaw him, and then he told me, he would be ſure to Correſpond with me and *Porter*; and I ſhould receive his Letters of Mr. *Charnock*, or Mr. *Johnſon*, and he accordingly did; and in his Letters he ſtill gave us hopes, and ſaid, he would certainly ſend us notice to be in Readineſs time enough, to be Serviceable to the Deſign of the Invaſion.

The laſt Letters I received from *Parker*, gave me Advice, That he doubted not, but the Cauſe would come to a hearing at this *Eaſter* Term; and he ſhould Write no more, but bring the Orders himſelf; upon which I went to *Charnock*, and he told me, he did expect him here in a ſhort time: But always or moſt commonly in his Letters, he told me, for a Sign, That when the *Thoulon* Fleet ſhould joyn the *Breſt* Fleet, I might certainly depend that we ſhould be Invaded here.

During theſe Tranſactions Captain *Porter* complained, That ſomething he was ſending to *Lancaſhire*, had miſcarry'd; he deſir'd me to ſet by two

Boxes,

Boxes, which I looked not into, but ſuppoſed them to be Arms, and I did ſet them by for him: I had not bought any Arms, but had beſpoke ſome of one *Perry*, a Gunſmith, who ſaid I ſhould have them ready at a Weeks Warning.

After *Parker*'s having made his Eſcape, and getting into *France*, Mr. *Charnock* came to me, ſometime before the King's going to *Flanders*, and ſaid, he had ſomething to Propoſe to me; and deſired me to go along with him, which I did; and he brought me to one Mr. *W.* who ſaid, he expected a Commiſſion from King *James*, to Seize King *William*; accordingly we went to the Chocolate Houſe in St. *James*'s-*ſtreet*; and after ſome Diſcourſe about the Commiſſion he ſaid he expected, we appointed another Meeting at that place, and Adjourned from thence to my Houſe in *Brownloe-ſtreet*, where was preſent, Mr. *Charnock*, Mr. *Porter*, Mr. *W.* Major *M.* and Mr. *D.* The Subject of our Diſcourſe was, about the Surprizing and Seizing the King as he came from *Richmond*; and after ſeveral ways Propoſed to that purpoſe, I particularly asked; Suppoſe that the King were in our Power What then? For we ought to have Regard to ſome end or other in ſuch an Undertaking; for I was not willing to offer any thing to his Perſon. Mr. *W.* ſaid, we might have a Coach, and Convey him away; and he ſaid, he was aſſured of a Fort to be delivered to him, and put into his Hands (to the beſt of my remembrance, it was *Deal*) which might give us ſhelter till we might find opportunity to carry him into *France* by Shipping. I muſt confeſs, I did ſee very little probability in what he ſaid, neither did I believe, that he would receive any ſuch Commiſſion, as he ſaid he expected: (For about two Years ſince, I remember I ſaw Sir *George Barclaye*, with Colonel *F.* and Mr. *Porter*; Sir *George* was then going over to *France*, and it was the only time that ever I ſaw him; and then

Captain

Captain *Porter* and I did desire, that if King *James* designed any such thing as Seizing King *William*, he would send over a Commission, and a Pardon withal in Case of an Accident; (which Message Sir *George* carry'd over, and King *James* refused to send it.) However, we had another Meeting after that at my House, by which time, he said, he would shew us the Commission, and Facilitate the Design; it was at a House behind the *Temple*, where the aforesaid Company met, and Mr. *W.* brought with him one Mr. *H.* who he said, could furnish us with a Ship, which would be ready to Transport us after we had Seized the King; but upon Discourse with Mr. *H.* we found that the Demands were so Exorbitant, and not in possibility of being Complyed withal; and besides, no Order nor Commission being produced, we did desist then; for Captain *Porter*, and Major *M.* and I, did Declare we would not meddle without sight of the Commission. After this, Captain *Porter* and I talked of having a Vessel, and sending *Le Rue* and *Charnock* about it. We met at the *Fountain* by the *Temple-Gate*, and Sir *William Perkins* was there; and during the time of our being there, one called Sir *William* out, and Sir *William* called out *Porter*, who came in, and said, there was a Gentleman that could help us in this affair; who he was, I know not; I believe Captain *Porter* may, for I saw him not: But all this proved ineffectual, for the King went away suddenly, and no Commission ever came. And by Letters from *France*, I understood King *James* was Angry, that they had used his Name to what he had not Promised; and *Porter* and I wrote over by his Order, the Truth of the whole Matter.

Sometime after this, Captain *Porter*, the Earl of *Aylisbury*, Sir *John Friend*, Sir *William Perkins*, and Sir *John Fenwick*, and others, met about sending over some Proposals to King *James*, to expedite an Invasion; and likewise Captain *Porter* said, it was pro-

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per I ſhould be there, for he had Engaged for me. I told him, I would come, and at the Kings-Head in *Leaden-Hall-ſtreet*, I found the Perſons above named, together with my Ld. *Mongomery*, and one Mr. *Cook*.

The effect of their Conſultation was, the ſending Mr. *Charnock* with a Meſſage to this Purpoſe; That if the King of *France* could ſpare ſuch a number of Foot, and ſo many Dragoons, amounting to about 12 or 15000, or thereabouts, in all: That then upon notice given, that every particular Man there, was to furniſh ſuch a number of Horſe, ſome more, ſome leſs, to be ready to Succour the Forces from *France*, when Landed. Mr. *Charnock* went and returned with a Refuſal, that Forces could not be ſpared; Sir *John Friend*, and my Ld. *Aylesbury* were of Opinion, That if King *James* would venture hither with ſome ſmall Retinue, he had Friends enough to appear for him, without any Foreign Forces, but that was held in doubt.

I uſed afterwards to ſee my Lord *Aylesbury*; I always asked what News he heard? He ſaid, when he Received any Orders, I ſhould know, for he having been in *France* (as he did not deny) I ſuppoſed him not to be Ignorant of what was Intended.

And to the better Facilitating an Invaſion, Sir *John Fenwick* uſed to ſend over a Liſt of the Forces, and how they were Quartered, and what were in Garriſon, and what otherways Diſpoſed of: He having made a miſtake in the Account, *Parker* did by Letter, deſire me to try if I could procure ſuch an Account; which I accordingly did of one *Gibſon*, a Clerk in the Office, and ſent it over frequently.

After the Eſcape of *Parker* out of the *Tower*, Sir *John Fenwick*, when I asked him, how he got away, and how much Money was given? He ſaid, 200*l.* promiſed, and 300*l.* given; for when a Perſon came in and told him, he had brought him Liberty, and

was

was to have 200 *l.* he replied, you ſhall have 300 *l.* and it was made good to him afterwards.

Cardel Goodman.

Much about the ſame time I uſed now and then, with Captain *Porter*, to be with Sir *John Fenwick*, and it was Agreed, That if *Parker* ſhould not bring us timely Orders, That what Forces we could bring in, *(viz.)* *Porter* and I, we were to take Orders from Sir *John Fenwick*; this we offered him, and he kindly Accepted: And he then ſaid, That he believed, moſt of my Lord *Oxford*'s Regiment would go to King *James*. When I told Mr. *Paradiſe* had promiſed to bring in 7 or 8 to me, and that Mr. *Aynſworth* was to bring in 20, and *Parker* had ſaid, if I made 30. it was ſufficient for me.

As to the keeping the Horſes, Sir *John* ſaid, it was dangerous, and they would certainly be Seiz'd but the beſt way was, to have a Liſt of what Horſes were in and about the *London* Stables:

Captain *Porter* and I, ſent accordingly to view the Stables. I ſent Mr. *Reyhough*, and Captain *Porter* ſent *Cranborn*, and they took an Account.

Cardel Goodman.

Jurat. 24. *April*, 1696.
Coram me, *Ja Vernon.*

Mr. *Sergeant Gould.* Now Mr. *Speaker*, if you pleaſe, we will call ſome of the Grand-Jury that will give you an Account what Evidence they found the Bill upon——Mr. *Gracedue*, you were one of the Grand-Jury that found this Bill?

Mr. *Gracedue.* Yes, Sir.

Sir *Thomas Powys.* This is ſo far from being Evidence, that I think 'tis the Oath of the Grand-Jury, That they ſhall not Diſcloſe or Diſcover the King's Secrets. The Bill of Indictment is but an Accuſation. A Bill of Indictment cannot be given in Evidence againſt a Man for the leaſt Crime ſoever. It can't be given in Evidence to be Credited, becauſe 'tis but an Accuſation; and by Conſequence, whatever

ever any Witneſs ſays at that time, can go no farther. When a Perſon comes upon his Tryal, they can't ſo much as reſort to any thing that was Sworn before the Grand-Jury, nor make uſe of it.

Sir *Barth. Shower.* We humbly Oppoſe this Evidence; becauſe the Gentleman can give no Inſtance either from their Reading or Obſervation, That the Teſtimony that hath been given before a Grand-Jury, hath been given in Evidence to a Petit-Jury: And 'tis part of the Oath of a Grand-Jury Man, *That he ſhould not diſcloſe the ſame.* We do not ſay, ſuch Rules will bind this Houſe, but we hope the great Fountain of Law, will have ſome regard to the ſettled Rules of it. *Members.* Go on, go on.

Mr. *Speaker.* Mr. *Gracedue*, Will you give the Houſe an Account, who were the witneſſes before you upon finding the Bill?

Mr. *Gracedue.* The Witneſſes before us, were Captain *Porter*, and Mr. *Goodman.*

Mr. *Speaker.* Can you remember ſo well, as to give an Account to this Houſe of what Evidence Mr. *Goodman* gave.

Mr. *Gracedue.* Yes, I think I can. When he came before us, he told us, That he was at a Meeting at the King's Head in *Leadenhall-ſtreet*, where there was Sir *John Fenwick*, my Lord *Mongomery*, Captain *Porter*, Mr. *Charnock*, and others; and the Buſineſs was to ſend Mr. *Charnock* over to *France*, to procure Men to Invade this Kingdom; and 8000 Foot, and 2000 Horſe was propoſed. He told us, the Reſult of that Conſult was, That if *France* would ſupply 8000 Foot, and 2000 Horſe, it would be a ſufficient Power to come over; and that they would ſupply 2000 Horſe among themſelves. Upon which *Charnock* replyed Gentlemen, you ſend me over upon Uncertainties; you ſay, you will ſupply 2000 Horſe, but unleſs you give me ſome Aſſurance, I can't nor will go. And the Queſtion was propoſed to all of them, If they would make good their Proportion, and they pro-

miſed it ſingly: Says I, Did Sir *John Fenwick* promiſe? And he ſaid, Yes. Says I, Did my Lord *Mongomery*? And he ſaid, Yes. He was asked, Who elſe? But, ſays he, 'tis not a Queſtion for you to ask us; and for that he referred himſelf to me: For, he ſaid, he was not bound to anſwer further, having proved the Indictment.

Mr. *Serg. Lovel.* We deſire Mr. *Joſhua Meade* may be asked to the like purpoſe. Were you one of the Jury that found the Bill againſt Sir *John Fenwick.*

Mr. *Meade.* Yes.

Mr. *Speaker.* Pray, who were the Witneſſes before you upon finding of the Bill?

Mr. *Meade.* There was Captain *Porter*, and Mr. *Goodman*, Sir.

Mr. *Speaker.* Can you remember what Mr. *Goodman* teſtified then?

Mr. *Meade.* Mr. *Goodman* did then teſtify, That Sir *John Fenwick*, my Lord *Mongomery*, &c. were at the King's Head Tavern in *Leadenhall-ſtreet*, and *Charnock*, and the reſt there, did Conſult how to bring in their old Maſter. As to *Charnock*, That they agreed to ſend him over to King *James*, to know whether the *French* King could furniſh them with 8000 Foot, and 2000 Horſe, and that they would endeavour to meet him with 2000 Horſe. Hereupon *Charnock* (*Goodman* ſaid) put it to every one of them, to know if they were all of one Mind; and that they all ſaid they were. This he did prove, and this is all I can remember.

Mr. *Serg. Lovel.* We have many more to the ſame Purpoſe, if the Houſe think fit to hear them.

Members. No, no.

Mr. *Serg. Gould.* We will go thus much further; That upon the Tryal of Mr. *Cook*, wherein there was Evidence given by Mr. *Goodman*, this Gentleman that is the Priſoner at the Bar was particularly named to be concerned, we will call them that were preſent there at the giving of the Evidence. But

firſt

firſt, we deſire to read the Record of *Cook*'s Conviction.

Thereupon a Motion was made for the Councel to withdraw, And being withdrawn, a Motion was made for Candles, which paſſed in the Affirmative without a Diviſion, in regard it being dark, without Candles there could be no Motion made for Adjourning the Debate or Remanding the Priſoner.

Afterwards a Motion being made for Adjourning the Houſe till to Morrow-morning, the Houſe divided.

Ayes 141 Noes 163.

And ſo it paſſed in the Negative, And Sir John Fenwick, *and the Councel, and Solicitors, were brought in again to the Bar.*

Mr. *Speaker.* Mr. Sergeant *Gould*, The laſt Evidence you were about to offer was, That of the Record of the Conviction of Mr. *Cook.*

Sir *Tho. Powys.* Mr. *Speaker*, we oppoſe that being offered as Evidence. As I underſtand it, they are going to give in Evidence againſt Sir *John Fenwick* what was Sworn againſt Mr. *Cook*; that is not admitted in the Courts below; for, according to that Method, the Tryal of one in the Company would be the Tryal of all the reſt. This was never allowed in any other Caſe, and I hope you will not allow it here.

Sir *Barth. Shower.* The Indictment is, That they did Conſult together, but their Guilt is ſeveral; if they had been mentioned in one Indictment, and one had been Tryed at one time, and the other at another. it would not have been allowed that they ſhould give in Evidence againſt the one, what had been Sworn againſt the other: For though the Charge is by the ſame Witneſs, and for a fact done at the ſame Time, yet the Defence of the Parties may be different; and it cannot be expected, That we, on the behalf of Sir *John Fenwick*, are prepared to give an Anſwer, in regard of any Thing that was Sworn againſt Mr. *Cook.*

Mr. *Speaker.* Mr. Sergeant *Gould*, you hear the Exception.

Mr. *Serg. Gould.* We hope in this Caſe we ſhall go on with our Evidence, as offered and propoſed to this Houſe. Theſe Gentlemen have made their Objections, as if they were below in the inferior Courts; but we are here now before you, in a Parliamentary Way; and what is that which brings us here, but becauſe there is a Witneſs withdrawn by Artifice, ſo that we cannot produce him? And therefore we come, and humbly apply our ſelves, to this Honourable Houſe. Now Sir, you are Judges of the Method of coming at the Truth, and ſupplying that Defect; if we could produce him, there would be an End of the Matter; but in this Caſe we are in the Judgment of this Honourable Houſe, Whether we ſhall not give ſuch Evidence as he hath given upon his Oath, though in other Caſes it is not admitted.

Mr. *Serg. Lovel.* When we produced the Record of Conviction, we only produced it to ſhew you there was ſuch a Tryal; and by that means to let us in, to ſhew you what was Sworn by Mr. *Goodman* at that Tryal.

Then upon the Motion of Col. Granvill, *and Sir Rich. Temple,* Sir *John Fenwick,* and the Councel, and Solicitors, withdrew.

Sir *Rich. Temple.* If I did not beleive what is now offered, is, what was never offered before, and of dangerous Conſequence to every one here, I would not have troubled you at this time of Night. There has nothing been offered that this hath ever been done. They ſay, It hath not been done in inferior Courts. Pray, let us ſee if ever it hath been done in Parliament, That what was given in Evidence at another Tryal, ſhould be given in Evidence againſt another Perſon here, when this Perſon was not by, and had no Opportunity to defend himſelf againſt it. I am ſure it was never done yet.

Sir *Th. Mompeſſon.* This Gentleman complains this was never done. When the Duke of *Monmouth* was Impeached, the Bill was read Three times in one day, and that Gentleman moved for the Impeachment.

Sir

Sir *Rich. Temple.* Here were three Witneſſes that did declare they ſaw him in actual Rebellion, at the Head of an Army; but I hope I am not to anſwer for all the Proceedings then.

Col. *Granville.* When I ſaw the King's Councel going on to make uſe of that as Evidence, which was never allowed in any Court, I thought I ought to move for them to withdraw. And I ſhall never give my Conſent to have it Read, till ſome Body ſatisfies me 'tis good Evidence againſt Sir *John Fenwick.* I can't ſee how you can Admit this for Evidence. Are we to read all the Tryals that are upon this Plot? Therefore I deſire you will bid them produce, What is Evidence againſt Sir *John Fenwick,* and not trifle with you.

Sir *Tho. Littleton.* If you proceed in this manner, I know not when you will have done. They do not tell you, they produce this as Evidence againſt Sir *John Fenwick*; nor do I take this to be the only Evidence to prove him Guilty. If nothing but exact proof would have ſatisfied, this Bill would have not been brought in: But this is to make as good Proof as the Nature of the Thing will bear. You have heard ſeveral Things before, in Relation to *Goodman,* that poſſibly might ſtrictly be no more Evidence againſt Sir *John Fenwick* than this, as *Goodman*'s being withdrawn. Firſt, they offered to prove that he was gone, next that it was Suſpicious that Sir *John Fenwick* was privy to his going: Why did you admit the Evidence of what he ſaid to the Grand-Jury? What is this but to give Evidence of what he ſaid to the Petit Jury, wherein the Grand Jury and Petit Jury have both believed him?

Mr. *Harley.* I think if you had come to one Determination before you had entred upon this Matter, you had very much ſhortned your Buſineſs, that is, That you would not expect ſuch Proof as is neceſſary at Law; and it may be if you would come to it now, it would ſave you time: For I find by

the Councel, that what is Sworn againſt another Man, at another time, would not be Evidence at Law againſt the Priſoner; and I believe if he ſhould except to a Jury-man, becauſe he was upon *Cook*'s Tryal, it would not be allowed as a good Exception, and he would be told, he was no way concerned in another's Tryal.

Mr. *John Howe*. 'Tis a ſtrange ſort of Evidence that is offered here, and it is a ſtrange way of bringing it in. The Houſe made nothing lately of hear-ſay, and yet now hear-ſay muſt be taken for Evidence. I have heard that the *Grand-Jury* take an Oath not to diſcover what's Sworn before them; yet you have brought them hear as Witneſſes to give an Account of what was Sworn before them,) which I am afraid is a breach of their Oath, it ſhall make me give leſs Credit to what they ſay. We are here to Attaint a Man, but we muſt not ſpeak of Proof; ſtrange and new Doctrine! If you do not find it with Proof; the nature of the thing Implies it to be againſt Proof, every Mans Innocence is taken forgranted till the contrary be proved; And I have heard that two or Three did ſwear, that *Goodman* was not at the place at the time he Swore he was.

Mr. *Harcourt*. If you pleaſe to let the King's Counſel go on upon this, you will ſave a great deal of Time, and prevent any Exception to any Evidence afterwards: For 'tis not in the Power of Man to offer any Thing more abſurd. I don't believe that ever any Man heard of ſuch a Thing offered, That a Record ſhould be given in Evidence againſt a Man, that is no Manner of Party to the Record: I am ſure never any ſuch Thing was attempted before. As for the other Things, you had ſomething offered that made it ſeem doubtful how far you ſhould give Credit to them. Upon thoſe Matters, the Councel at the Bar for the King told you, That there was ſome Pretence that it was Law, and practiſed below, and a Book was produced to juſtify it: But in this

Caſe,

Caſe, If there be Book, Practiſe, Precedent, or any Thing to juſtify it, I will ſit down; the Anſwer made it Ten times worſe, The Gentleman ſaid, He would only have the Record read; to prove what was ſworn at that Tryal againſt Sir *John Fenwick*. Why does that concern any Perſon in the World but *Cook*?

Lord Cutts. If the worthy Gentleman that ſpake laſt had made out all his Propoſitions with Clearneſs, equal to the Aſſurance with which he aſſerted them, they would have more weight. But I will ſay, That which he hath aſſerted does not appear to me ſo. I take this to be the ſame thing in ſome Meaſure debated over again: It hath been told you, That this Houſe are to give their Judgment in a Matter of great Importance, and therefore I think 'tis fit that all the whole Matter ſhould be laid before them. When that is done, they only are the Judges of what Weight it is.

Mr. *Sloane.* I go along with thoſe Gentlemen, That this is no ſort of Evidence againſt Sir *John Fenwick*: But our Queſtion is about a Witneſs that is withdrawn, and to know what he ſaid, and how he was believed when he was here. How he is gone, we have ſeen already; and therefore though I think the Verdict againſt *Cook*, nor nothing of that, can be given in Evidence againſt Sir *John Fenwick*; yet if he hath withdrawn the Witneſs, and the Credit of him is at ſtake, as you have heard Evidence of what he ſaid upon Oath, before the Tryal came on, by the ſame Reaſon you may hear what he ſaid at the Tryal.

Mr. *Pelham.* I think it would ſhorten our Debates, if we were truly ſatisfied about what we are a Doing, That we are Trying Sir *John Fenwick*, as we were told at the Bar. He called it a Tryal, and 'tis a Tryal. I muſt confeſs I was in hopes I ſhould never ſit in the Houſe of Commons to try any Body; I did not thing it the Buſineſs of us;

if I had, I would not have come hither: But ſince we are come into it, Is any Thing more natural, than to examine whether this Evidence be proper, or ſuch Evidence as any Court would allow of?

Sir *Will. Williams.* I ſuppoſe there is no Gentleman of our Profeſſion that hath ſeen any Record will ſay, That this hath been offered in any Court of Law. I believe, if he was upon his Tryal upon the Indictment, no Body will ſay it could be read againſt him. Let us conſider how many Judgments that have been given haſtily, in the late Reigns, have been reverſed. What is the Reaſon that is given for it? It is for receiving that for Evidence which was not Evidence in the Law. Your Bill of Right takes notice of it.

Mr. *Sol. Gen*: I did not think this matter would have held you a quarter of an hour. But if the Gentlemen will debate upon the ſame matter that hath been overruledtwice before,it is their fault; if this Matter is longer than it ought to be, all that is to be proved by this Record, is that one *Peter Cook* was attainted of High-Treaſon; if the Councel on the other ſide would have owned *Peter Cook* to have been attainted, you had not been troubled to have had the Record brought to the Table. But as to what they ſay, that Sir *John Fenwick* was no party to the Record, and therefore it can be no Evidence againſt him, It is true, Of it ſelf it is no Evidence againſt him, but this as it is opened is to introduce the Evidence of what's Sworn by a Witneſs upon that Tryal, which cannot be done, Unleſs that Tryal be firſt proved by the Record of it; yet after the proof of that Tryal, whether you will admit what the Witneſſes Swore in that Tryal, ſhall be Evidence in this Caſe, will be conſidered hereafter.

I Believe no Body will deny, but that what *Goodman* Swore in that Tryal, might have been Evidence for Sir *John Fenwick*, as ſuppoſe *Goodman* had ſworn in that Tryal, that he himſelf had never been at the

King's-

King's-Head-Tavern with Sir *John Fenwick.* Would not the Priſoner have produced a Witneſs to prove what *Goodman* had ſworn in that Tryal, if he ſhould have appeared now, and have ſworn that Sir *John Fenwick* and he had been at the *King's-Head-Tavern*, about the matter Sir *John Fenwick* is now accuſed of.

I will put you in mind of a Caſe, becauſe there is a Nicety ſtood on in this matter without any reaſon.

It was in the Tryal of Alderman *Corniſh;* he was indicted and tryed, and the great matter (as it was pretended) was Tranſacted in the Houſe of One *Sheppard.* There was a Witneſs againſt *Corniſh*, One *Rumſey*, who Swore what *Corniſh* ſaid upon the reading a Declaration in *Sheppard*'s houſe; ſays *Corniſh*, *Sheppard* was a Witneſs at my Lord *Ruſſel*'s Tryal, and in that Tryal named who were preſent at the reading the ſaid Declaration, but he did not name me to be one: And when *Sheppard* in the Lord *Ruſſel*'s Tryal ſaid he thought *Rumſey* was alſo in the Room at the ſame time the Declaration was read, *Rumſey* in that Tryal ſtood up and ſaid the Declaration was read before he came into the Room, and therefore what he Swore in the Tryal againſt *Corniſh*, was a contradiction to what he ſwore in the Lord *Ruſſel*'s Tryal. Mr. *Corniſh* in that Tryal would have produced a Witneſs to have proved what *Rumſey* Swore in the Lord *Ruſſels* Tryal; ſays the Court, we cannot admit of that Evidence, for it doth not appear to us that the Lord *Ruſſel* was ever Tryed for *High-Treaſon*, and unleſs a Record of that Tryal be produced, we cannot admit the Evidence of what *Rumſey* Swore in that Tryal, and thereupon by that Slip was that Gentleman deſtroyed.

I pray the Record of *Cook's* Tryal may be read. I have given no Opinion of what force it will be. But I think it depends upon the ſame reaſon, as you have ordered other things to be read, which you intend to conſider and give your Judgment of hereafter.

Nay

Nay, you have more reaſon to do this, than any thing you have read this day.

Mr. *Price.* 'Tis very much preſſed, That you ſhould Read that which when Read, they ſay, is not Evidence, but only to introduce another Matter. If it be not Evidence, upon what Account ſhould they Read it? But if it introduce other Evidence, this is an Ingredient and Part of that Evidence. Now ſuppoſe the Record ſhould be produced, and they ſhould bring Witneſſes to ſay what *Goodman* Swore at that Tryal, would that be Evidence? No ſure, for no body ever pretends that this hath been Admitted either at Law, or in Parliament. By what Law? By what Rule? By what meaſure of Reaſon are we to Proceed in this Houſe? If you will admit to be produced a Record of Conviction of a third Perſon, and this to be Evidence againſt one that was not preſent at that Conviction I think you may as well Admit to be produced a Record of the Conviction of any other concerned in the Aſſaſſination. But I ſtood up Principally upon the Obſervation made at the Bar, and he puts you that which he takes to be a ſimile Caſe; ſays he, ſuppoſe Sir *John Fenwick* had brought this Record, and made uſe of it to take off *Goodman's* Teſtimony, ſhould it not be Evidence? Yes, no doubt of it, and there is this Diſtinction: 'Tis one thing where you are to give in a Record to Convict and Attaint a Perſon, and another thing where 'tis to prove a Man Perjur'd, and to Invalidate his Teſtimony. For when a Witneſs is brought againſt a Priſoner, he hath no way to take off his credit, but from what is Collateral. If upon a Tryal wherein another is concerned, a Witneſs gave a contrary Evidence, or the Party was Acquitted, then that Record may be made uſe of againſt that Witneſs: But it differs very much, where you bring Evidence to take off the Credit of a Witneſs, and where you bring it to Convict or Attaint a Perſon, The Caſe of *Corniſh*, That turns upon the ſame Reaſon, and it was only to be uſed

to

to take off the Teſtimony of *Rumſey*. But if this Record of the Conviction of *Cook* be brought to any purpoſe now, 'tis to ſatisfie our Conſciences, that *Goodman* gave a good Teſtimony at that Tryal; and I wonder the Sergeant ſhould offer it, who is Sworn to offer nothing in Violation of the Law.

Dr. Oxenden. If I did not think this Queſtion had been Determined before, I ſhould not trouble you in this Debate, for did we not receive what *Goodman* depoſed upon Oath before a Juſtice of Peace? Was it received becauſe it was taken in Writing, or becauſe it was his Evidence? Now they offer you an Evidence of his, that was not put into Writing; but they will prove it by Witneſs. What is the Difference? if it had been taken down in Writing, it muſt have been Admitted as the ſame was before.

Sir *M. Wyvell.* That Worthy Gentleman deſired to know the difference, *&c.* That Depoſition was againſt Sir *John Fenwick*, but this Evidence that they offer now, was given againſt *Peter Cook*.

Mr. *Att* : *Gen.* You are now upon a Debate, Whether you ſhall Read the Conviction of *Peter Cook*? I do agree with thoſe Gentlemen that have ſpoke of this Matter, that the Conviction of *Cook*, nor any Evidence upon his Conviction, can be Evidence againſt Sir *Fenwick*. I don't pretend that this is: Nor don't believe that this is offered upon any ſuch Conſideration. But 'tis one of the Allegations of the Bill, that ſeveral of theſe Gentlemen were preſent at this Conſult, of which Sir *John Fenwick* is Accuſed; therefore I ſuppoſe the Council for the Bill, did offer this Record to make good that Allegation, and ſo I think it may be properly offered, unleſs it be Admitted. I don't ſee how it can be made good further. I do not think it proper to Examine to what *Goodman* Swore at *Cook*'s Tryal.

Sir *Will. Williams.* I now ſpeak only to ſhew my Concurrence with the Attorney General; Mr. Attorney hath Stated it right. No doubt, as to the Conviction

viction of this Perſon (as Mr. Attorney offers it) it may be proper enough.

Members. Call them in, call them in.

Sir Chr. Muſgrave. I hear Gentlemen ſay, Call them in. Do you intend when you call them in, to Read this Record? I think the learned Gentleman hath Stated it, That it ought not to be Read as Evidence. Now the Counſel for *Sir John Fenwick* ſaid, they hoped you would not ſuffer it to be Read as Evidence againſt the Priſoner. I never heard the Counſel ſay, that *Cook* was not Attainted, nor ever heard that any Man did doubt it. Then if it be no Controverſy between the Counſel, to what end is it brought hither? Do you think that the Steps that are urged to be taken in this Caſe will not be urged with great ſtrength hereafter and that this will not be a Precedent for Poſterity? I take it that there is a great deal of difference between the Paper you have Read, and this Record, and therefore if you call in the Counſel, I hope you will not gratifie them in Reading of it.

Mr. *Edw. Harley.* Before you call the Council in, I humbly propoſe it to you to conſider to what purpoſe this Record ſhould be Read; if as Evidence, you overthrow all the Courſe of Proof that is ſettled by the Common Law, and Statute Law; for it hath been in all Tryals oppoſed, to give in Evidence that which is improper, becauſe it ſhould not Influence the Jury. I would not have it ſaid, That under the Reign of K. *William*, any thing was done contrary to the Law and Conſtitution of the Nation. There hath been an Inſtance given of the Tryal of Mr. *Corniſh*, though that Caſe does not come up to it, but we know what was done in thoſe Reigns have been juſtly reflected upon: and I hope you will not make a Precedent here, to encourage Judges to do what is againſt Law.

Mr. *Speak.* Gentlemen, this is your Queſtion, *That the Record of the Conviction of* Peter Cook *ſhall be Read,*

which

Which Queſtion being put, the Houſe Divided.

Ayes 181. Noes 110.

So it paſſed in the Affirmative.

Mr. *Speak.* Gentlemen, you have had another Queſtion that hath been the Subject of your Debate, *That the Councel for the Bill be Admitted to give Evidence, as to what* Goodman *Swore againſt* Peter Cook.

Mr. *Rob. Harley.* The Learned Gentleman did tell you, That what *Goodman* ſaid at that Tryal, ought not to be given in Evidence; and therefore, I think, Gentlemen won't inſiſt upon that, that is carrying it too far; and I think, he opened it, That it was only to prove that *Cook* was Attainted, and to make uſe of it no further.

Mr. *Speak.* Is it then your Pleaſure, that Sir *John Fenwick* and his Councel he called in?

Which Queſtion being put, it paſſed in the Affirmative, and Accordingly they were called in.

Mr. *Speak.* Sir *Tho. Powys*, the Houſe hath Determined to have this Record Read, not as Evidence, againſt Sir *John Fenwick*, but to prove the Allegations in the Bill, and that *Cook* was Attainted, Read the Record.

Accordingly that Record was Read by the Clerk.

Sir *Barth. Shower.* We are ſure the Record does not prove that he was Convicted upon *Goodman*'s Evidence.

Mr. *Serg. Lovell.* Look upon the Indictment.

Sir *Tho. Powys.* It appears by that, That *Goodman* was a Witneſs upon the Indictment; but it does not prove, That he was a Witneſs upon the Tryal.

Mr. *Serg. Gould.* May it pleaſe you then, Mr. *Speaker*, thus far 'tis Agreed, That here is a Record of the Conviction of *Cook*, and 'tis Agreed, and the Record ſpeaks it, That *Goodman* was a Witneſs, for it is Indorſed upon the Indictment. Now the main Diſpute is, Whether *Goodman*'s Evidence did prevail to Convict *Cook* upon that Indictment? And for that we ſhall apply our ſelves, and Call our Evidence,

ſome

ſome of the Jury, and ſome that were then Witneſſes, and they will give you an Account upon what Evidence that Conviction was.

Sir *Tho. Powys.* In what you were pleaſed to acquaint us at our laſt coming in, you were pleaſed to give ſuch a Reaſon in Relation to the Reading of this Record, that if we had heard it before, we would not have troubled you to have withdrawn; for it was proper to make out the Allegations of the Bill, and that *Cook* was Convicted; but we apprehend they can carry it no further than what they have applyed it to. But I perceive from hence, the Gentlemen on the other ſide are encouraged to proceed to another piece of Evidence, ſuch they call it; they are going to call the Witneſſes to prove what was Sworn at the Tryal of *Cook*, where Sir *John Fenwick*, nor no Perſon on his behalf, was preſent, either to hear, or obſerve, or croſs Examine, or offer any thing to their Credit, which poſſibly he might be furniſhed with, though *Cook* was not; I hope that will be no more allowed of as Evidence here, than in any other place.

Sir *Barth. Shower.* We humbly oppoſe their calling of Witneſſes to give this Account of the Evidence given at *Cook*'s Tryal. And we ſubmit it to your Conſideration, whether you will think it Juſt, that the Evidence that is given with reſpect to one Man only, ſhall conclude another Perſon that ſtands at a different Bar in defence of his Life, or that it ſhall be given againſt him. Every Man's Defence is ſeveral; and we oppoſe the Reading of the Record before, and ſo do now the calling of any Witneſſes to this purpoſe, for the ſame Reaſon.

Mr. *Serg. Lovell.* We call theſe Witneſſes for no other purpoſe, but to prove that *Goodman*, what he did Inform by that Paper, he did Swear before a Jury; *Then a Motion being made for them to withdraw.*

Mr. *Speak.* Gentlemen, you muſt withdraw.

Accordingly they withdrew.

Mr.

Mr. *Manley.* I thank God I have that regard for the Laws of *England*, and to every Engliſh Man's Life, that when I ſee any thing Attempted againſt them, I muſt give my Teſtimony againſt it, I did not believe they would have inſiſted on it, for there was a Gentleman that ſat near to you, who in the Cloſe of his Debate, I thought had ſatisfied every body, That this was a thing that ought not to be Read; if they ſhould do it, it would be a thing of dreadful Conſequence. If you ſhould Admit of every thing theſe Gentlemen that come in for the Bill offer, I know not where it will end. How will it appear, that upon *Goodman*'s Evidence the Jury found *Cook* Guilty? For they might find *Cook* Guilty, and yet give no Credit to *Goodman*; for he was contradicted materially, and there might be other Evidence upon which they might find him Guilty, and yet lay aſide the Evidence given by *Goodman*: But whether one way or the other, we can't tell. They tell us, we are not to be guided by the Rules of *Weſtminſter* Hall: But we are to be Governed by the Rules of Juſtice, and we are not at this time to ſeek a way to the King's Favour by Voting againſt a Criminal for High Treaſon.

Mr. *Sloane.* There is no manner of doubt of it, but that Gentleman is in the right, who tells you, If this Indictment and Conviction of *Peter Cook*, ſtood ſingly, as to Sir *John Fenwick*, 'tis no Evidence, and if they will produce *Goodman* now, it ſhall be no Evidence againſt them; but take the Caſe as it is, Here is a Witneſs, who hath given me ſatisfaction, that 'tis one of Sir *John Fenwick*'s Friends or Agents (which is the ſame thing as if done by himſelf) by whoſe means this Witneſs is withdrawn: Now the Queſtion is, *What could this Witneſs ſay, if he were here?* What did he ſay? 'Tis not Concluſive, but 'tis Material for you to hear what he did ſay when he was upon his Oath.

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Sir *Chr. Muſgrave.* The Gentleman of the Long Robe that ſpoke laſt, was pleaſed to tell you, It is very reaſonable that you ſhould hear thoſe Perſons, as to what *Goodman* Swore at *Cook*'s Tryal. I confeſs, I think this is harder than all the reſt, becauſe what you have hitherto Admitted was in Writing. One thing was an Examination before a Juſtice of Peace, the other a Record; but for any Man to ſay, he can exactly repeat what any Man Swore at the Tryal, to me is wonderful. Why in his Evidence, the leaſt miſtake of a Word alters the nature of the thing, and therefore this would be a bold undertaking for any Man; for if he varies in the leaſt Circumſtance, 'tis not true that he Swore ſo then, This Gentleman was no ways concerned in that Tryal, and to what purpoſe is it Read, if not to the Prejudice of Sir *John Fenwick*? I do not know but by the ſame Rule you may hear Evidence of what any Man hath Sworn upon all the Tryals theſe three quarters of a Year.

Mr. *Sloane.* I have been called upon, to know in what Caſes Teſtimony hath been given, that Witneſſes have Sworn ſo and ſo at a former Tryal. 'Tis every days Practice between Party and Party, that where a Witneſs does die, between the ſame Parties (I will ſtate the Caſe fairly) 'Tis given in Evidence, That ſuch a Witneſs at ſuch a Tryal, did Swear ſo and ſo. Sometimes they take it in Short Hand, and then they can tell the Words of it, otherwiſe they repeat it upon their Memories, but I will not ſtrain it. But I put it with a further Reaſon upon it, for we do not deſire to hear it as Concluſive Evidence upon the Priſoner, but only in this Senſe, Here is a Witneſs ſuppoſed to be carry'd away by the Priſoner's Means, and therefore, is it not neceſſary to hear what he ſaid before he was deluded and carry'd away? Not that after it is heard, it is any Concluſive Evidence, but it is reaſonable that we ſhould come at the Truth, *Omnibus viis, & modis quibus Melius ſciri poterit.* Sir

Sir *Tho. Littleton.* A Gentleman ſays, to what purpoſe ſhould it be Read, if it be not to the Prejudice of Sir *John Fenwick?* On the other ſide, we may ſay, 'tis for his Benefit; that is only ſuppoſing one way or another: I will hear any body to his Benefit, and any Body to his Prejudice. Says a Worthy Gentleman, It is not done in Criminal Caſes: Why, in this Caſe you have heard the Grand Jury, what he Swore before them already; And what Objection is there more againſt hearing what he Swore in another Caſe, than againſt hearing what he Swore upon the Indictment? The main Inducement for you to hear it, is becauſe he is gone away, (and can't be heard *Viva Voce*,) and with Suſpicion that it was by Contrivance of the Party.

Mr. *Gery.* I would ſpeak but one Word as to what the Gentleman that ſpake laſt, but one ſaid, and that is, as to the Courts below, That one Man is allowed very often to give in Evidence what another Swore. It hath been ſo, and 'tis at the Peril of any Perſon that Swears, that he Swear Truth; for he may be Proſcuted if he does not Swear Truth. But I would ask him, What remedy there is if he do not ſay the Truth here? We have no remedy againſt him if he takes away this Man's Life by what he ſays here.

Mr. *Smith.* Truly, Sir, if I muſt give my Opinion, I do think 'tis very reaſonable, that Bills of Attainder ſhould be only upon Extraordinary Occaſions. I think that take it at beſt, if there was not a place where the Witneſſes are to be Sworn, and more particularly Examined, I know not whether I ſhould give my conſent for the Paſſing of this Bill through your Houſe; for the Witneſſes againſt the Priſoner are not Sworn, nor the Witneſſes brought againſt them; ſo that we can only give our Opinion upon the Probability of the Matter; For what that Gentleman ſays, weighs with me, That 'tis a Difficult thing for any Man to Charge

himſelf with what was Sworn at a former Tryal; for the miſtake of a Word may alter the Senſe very much. We are told, by a Worthy Gentleman, That there was two or three Witneſſes that did give ſuch Evidence againſt the Teſtimony of *Goodman*, that 'tis a wonder almoſt how *Cook* could be found Guilty: It is our misfortune that *Goodman* is not here, it would have been worth our while to have heard what *Goodman* could have ſaid in his own Defence; but ſince there are ſuch Witneſſes like to be offered againſt *Goodman*'s Teſtimony, Is it not reaſonable that we ſhould hear what *Goodman* ſaid for himſelf?

Mr. *Howe*. Sir, I always thought it very reaſonable, that you ſhould hear any Evidence that might tend to your Information; but I think 'tis plain, that nothing can tend to your Information; that is alledged by any Perſon that is not to be believed; That is to ſay, is not to be believed from the Nature of the Evidence, though the moſt Credible Perſon in the World. I know not whether theſe Witneſſes are to be brought or no, but I have heard that *Cook*, after he was Condemned to die, without any apprehenſion of his being Saved, did upon the Sacrament Declare, That *Goodman* was not upon the place at that time he Swore himſelf to be there. I have heard ſince, that the ſame Divine that gave him the Sacrament, Dr. *Wake*, when he heard he had again Contradicted that ſo ſolemn Declaration, had ſuch an Abhorrence of the Proceedings on all ſides, that he would go to him no more. I can't think we can have Information from theſe Perſons, who I ſuppoſe did not think of giving Evidence in this Tryal, and therefore did not take notice ſo particularly of what he ſaid, and if ſo, 'tis loſing your time.

Mr. *Speaker*. Gentlemen, the Queſtion is this, *That the Counſel againſt Sir* John Fenwick *be allowed to Examine Witneſſes, as to what* Goodman *Swore at the Tryal of* Peter Cook.

Sir

Sir *Godfrey Copely.* I muſt confeſs it would weigh with me, if it had been made appear, that Sir *John Fenwick* had taken off any Evidence, and I ſhould be ready to ſupply it as well as I could; but I muſt needs take notice of what was ſaid in this Debate, that we had done as much as this comes to already. This makes me a little more apprehenſive, and to take care what we do now, ſince what this Houſe does, hath ſo quick an Operation. We are citing Precedents of this very Day already, and make one thing a Hand to draw on another, and ſo they may eaſily be made uſe of in after Parliaments.

Sir *Hen. D. Colt.* I believe no one Gentleman doubts, that *Cook* was Convicted upon the Evidence of *Goodman*; if they do I would know the Reaſon of it; for upon the laſt Act, there are to be two Evidences to the ſame Treaſon: There was but two poſitive Witneſſes againſt him for Treaſon, and they were *Porter* and *Goodman*: I think, therefore, he was Convicted upon the Evidence of *Goodman*; What then needs any Perſon to remember any Particulars that paſſed at the Tryal, if they remember in the whole, that he was Convicted by the Evidence of *Porter* and *Goodman*?

Mr. *Speaker.* *As many as are of Opinion that the Councel againſt Sir* John Fenwick *be allowed to Examine Witneſſes, as to what* Goodman *Swore at the Tryal of* Cook *ſay, Aye,*

And the Negative being put the Houſe divided.

Ayes 180. Noes 102

Afterwards the Queſtion of Adjournment was put, and it paſſed in the Negative,

And Sir *John Fenwick,* and the Councel, were brought in again.

Mr. *Speaker.* Mr. Sergeant *Gould,* the Houſe do allow you to Examine Witneſſes as to what *Goodman* Swore at the Tryal of *Cook.* Pray go on with your Evidence.

Mr. *Serg. Lovell.* We call Mr *Collins*, Sir.

Who was brought to the Bar.

Mr. *Speaker.* Was he a Jury-Man?

Mr. *Serg. Lovell.* He was one of the Petit-Jury, Sir,

Mr. *Speaker.* Mr. *Collins*, can you give the Houſe an Account of what was Sworn by *Goodman*, upon the Tryal of *Cook*?

Mr. *Collins.* To the beſt of my Memory, I will give the beſt Account I can. *Goodman* did Depoſe, That he came to the King's Head in *Leaden Hall-Street*, and enquire for Cap. *Porter*, according as the Captain had Ordered him, and the Captain came down and carry'd him up into the Room where the Gentlemen were. There was Sir *John Friend*, Sir *William Perkins*, Mr. *Charnock*, Mr. *Cook*, and Sir *John Fenwick*; there was two others, if you pleaſe to have me Name them.

Members. Yes, yes.

Mr. *Collins.* My Lord *Ayleſbury*, and my Lord *Montgomery*. This was what he Depoſed.

Mr. *Speaker.* Go on, Sir, you have Named thoſe that were at the Meeting.

Mr. *Serg. Lovell.* Did he give you an Account of what was Agreed on at that Meeting?

Mr. *Collins.* I think, it was about ſending *Charnock* to *France*.

Mr. *Speaker.* Sir, you ſhould Repeat all the particulars what *Charnock* was to do.

Mr. *Collins.* I can't remember any thing further than what I have told you.

Mr. *Serg. Gould.* If you pleaſe that Mr. *Cooper* may be asked to this.

Mr. *Speaker.* Was you of the Jury that Convicted Mr. *Cook*?

Mr. *Cooper.* Yes.

M. *Speaker.* Can you give the Houſe an Account what Evidence *Goodman* gave to you for the Conviction of *Cook*, and what he ſaid in that Evidence?

Mr.

Mr. *Cooper.* Mr. *Goodman* did Declare in his Evidence, That he was at the Old King's Head in *Leaden Hall-Street*, where he did meet with divers Perſons that were in Conſultation; he named *Charnock*, Sir *John Fenwick*, Sir *John Friend*, and divers others.

Mr. *Speaker.* What was the Conſultation?

Mr. *Cooper.* It was about ſending *Charnock* over into *France.*

Mr. *Speaker.* To what purpoſe?

Mr. *Cooper.* To bring over Forces, or encourage the bringing over of Forces: That was the Purport of his Meſſage.

Mr. *Speaker.* Will you produce any other Evidence to this Point?

Mr. *Serg. Gould.* We deſire this Gentleman may be asked to the ſame purpoſe.

Mr. *Speaker.* Was you one of the Petit-Jury.

Another Witneſs. There was Capt. *Porter*, and Mr. *Goodman*, that were the two Evidences; and *Goodman* did ſay, That he had been at the Old King's Head in *Leaden Hall-Street*, one *Coxe's*, and Sir *John Fenwick* was there, and ſeveral other Gentlemen, Conſulting of an Affair to ſend over into *France* for ſome Forces to be brought over into *England*, and that *Charnock* was the Perſon they all Agreed ſhould go over.

Mr. *Speaker.* But did he give you an Account of what *Cook* and the others did Agree to, upon which you found Mr. *Cook* Guilty?

The ſame. We did apprehend that *Cook* did Conſent, that *Charnock* ſhould go over to *France*, and acquaint King *James*, That there had been a Meeting of ſeveral Gentlemen, and that they had made ſeveral Offers of Soldiers and People that were to be raiſed here, and to acquaint King *James* with it, and he Declared, That Sir *John Fenwick* was there at the ſame time.

Mr. *Speaker.* Pray, can you give this Houſe an Account of what Exception was taken to *Goodman's* Credit, and how it was anſwered?

The ſame. There was Exception taken, That he was Guilty of a great many Crimes, and that he had his Pardon, and the Fines were Levy'd upon him; but it was ſaid there, that he had pay'd his Fine and that he was a very good Evidence in the Caſe.

Mr. *Speaker.* Mr. Sergeant *Gould*, Have you any other Evidence to produce?

Mr. *Serg. Lovell.* If you pleaſe, Mr. *Speaker*, here is Mr. *Tanner*, the Clerk of the Arraignments, that beſt knows the Nature of theſe things. As to theſe Objections that were made, it apppeared to the Court to be a Contrivance, for he was never Bailed, but diſcharged without any more to do. If you pleaſe that he may be asked, What Objections were made to *Goodman*'s Reputation, and what Anſwer was made to it then?

Mr. *Speaker.* I did ask the Jury-Man that; and I ſuppoſe you need not labour that Point unleſs the Credit of *Goodman* comes in queſtion here.

Mr. *Serg. Gould.* Then may it pleaſe you, Mr. *Speaker*, we have one other piece of Evidence againſt Sir *John Fenwick*, which we are humbly to offer to your Conſideration, and I think 'tis very Material, and 'tis ſome of the Evidence which I did open in Stating of the Caſe, wherein Sir *John Fenwick* hath, in a manner, given a Verdict againſt himſelf. For while Sir *John Fenwick* was working of his Eſcape to go beyond Sea, at that very time there was a Letter written by him, directed to his Lady and delivered into the hands of one Mr. *Fowler*, who was to cauſe it to be delivered to his Lady, the Letter was delivered by one *Webber*, who was taken up when Sir *John Fenwick* was. This Letter Imports, That Sir *John Fenwick* look'd upon himſelf as having no Defence, but depended only upon a Contrivance with the Jury; and he adviſes to work with ſome Perſons of the Jury, who were to ſtand it out, and to ſtarve the reſt;

and

and ſo by that Means to ſave him. Our Evidence of this will be, It falls out that *Webber* (we have him not here now, but have endeavoured it as much as was poſſible, but he is gone too out of the Way) that was taken at the ſame time that Sir *John Fenwick* was; but by reaſon of the Protracting of Sir *John*'s Tryal, was Delivered, there being no Charge againſt him, is ſince his Deliverance, upon his *Habeas Corpus*, gone out of the Way. But we ſhall, in the Method of our Evidence, produce you Mr. *Fowler*, the Perſon to whom this Letter was handed, who will give you an Account of this Letter, and then we will produce this Letter. To which End, we muſt humbly beg the Favour of a Worthy Member of this Houſe, Mr. *Vernon*, who hath this Letter, that it may be produced, and ſhewed to Mr. *Fowler*.

Mr. *Vernon*. Sir, I receiv'd your Order to bring the Letter that Sir *John Fenwick* wrote, while in Cuſtody at *Rumney*, which was ſent up to me by Mr. *Maſcal*, who had it of Mr. *Fowler*. And if you pleaſe, I am ready to deliver it.

Mr. *Speaker*. Who ſent it to you?

Mr. *Vernon*. One Mr. *Maſcal*, a Juſtice of Peace of *Rumney*.

Sir *Tho. Powys*. I hope now we ſhall make an Objection to this Letter, with good Authority. Surely for them to produce a Letter, as Sir *John Fenwick's*, is not to be allow'd as Evidence, unleſs it was proved that he wrote it, becauſe that ſort of Evidence was particularly taken notice of by Parliament: And Judgment given upon that ſort of Evidence, by Compariſon of Hands in the Caſe of Mr. *Sidney*, and the Act of Reverſal of his Attainder, does declare it to be illegal Evidence. This is ſuch an Authority as, I hope, will bear no Diſpute: And the Courts of *Weſtminſter* Hall, have ſince thought it ſo; they did ſo adjudge in the Caſe

of *Crosby*, who was Tryed the other day in *Westminster* Hall.

Sir *Barth. Shower.* In this Objection we have the Opinion of inferior Courts, and the Parliament too; for the particular Evidence Mr. *Sidney* was Convicted upon, was a Paper found in his Closet, and proved by some who pretended to know his Hand. We do therefore humbly oppose this Evidence, It being in the Case of the Life of a Man; and the King, Lords and Commons, having declared, That this sort of Evidence ought not to be allowed. And therefore, I hope, you will not allow it in this Case.

Sir *Tho. Powys.* I have a Copy of the Bill for reversing the Attainder in my hand; and it says, *The producing a Paper found in the Closet of Mr.* Sidney, *which was not proved by any Witness to be his Hand-writing, &c.* And, we hope, if in the Judgment of the Parliament that was not thought reasonable Evidence to Attaint him, this will not be thought reasonable in Parliament to Attaint this Gentleman.

Mr. *Serg. Gould.* As this Case is, we hope this may be a concurring Evidence. It will be plain upon the Evidence we shall give, That *Webber* was with Sir *John*, and taken with him; and at that time this Letter was handed by him over to *Fowler*, to be carried to Sir *John Fenwick*'s Lady. Now, Sir, we humbly offer it to your Consideration, How far 'tis available, and what Operation it will have? Whether in a Case of this Nature, these two being taken together, and *Webber* delivering this Letter to Mr. *Fowler* to deliver it to Sir *John Fenwick*'s Lady, and the import of the Lady concerning Sir *John Fenwick* for his Acquittal, you will not suffer it to be read? Tis not to Charge him with a Treason, for that was the Case of Mr. *Algernoon Sidney*: it doe's not prove a Crime upon him; but if you please we can prove that Sir *John Fenwick* handed

ded this Letter over that it might come to his Lady, by which he deſired his Lady ſo far to work the Matter, *That ſome Jury-man might be found to ſtarve the reſt, and ſtand out for him* If we could produce *Webber* we would. 'Tis plain, *Webber* correſponded with Sir *John*, and was with him.

Mr. *Serg. Lovell.* I humbly beg one Word in this Matter. The Councel on the other ſide do very well know the conſtant Practice is, That in the Caſe of a Deed or Will, let the value of the Eſtate be what it will, if the Witneſſes can't be produced, or are gone beyond Sea, they always admit Evidence by Compariſon of Hands. But for the Caſe of Mr. *Algernoon Sidney*, there is no doubt but his Attainder ought to have been Reverſed, becauſe that Attainder was upon no other Evidence; but from a Paper, that he himſelf did ſay, was only for the Exerciſing of his own Ingenuity and Parts; and proved only by the Compariſon of Hands. Had there been any other Witneſs to corrobor ate it, it had altered the Caſe. In our Caſe, we do produce the Letter, not for the Convicting of the Priſoner at the Bar, but we are humbly to lay before you all the Matter of Fact. It will be worthy of your Conſideration, what you will think fit to take, and what to reject; that is a Matter for your own Judgment. We produce this Letter for this Purpoſe, to ſhew you, That after Sir *John Fenwick* was taken, he apprehended his Caſe to be ſo Deſperate, that he uſed theſe indirect Means.

Mr. *Speaker*. What mean you by that? This Letter came from Mr. *Fowler*.

Mr. *Serg. Lovell.* Here is Mr. *Fowler* that receiv'd it from *Webber*, in the preſence of Sir *John Fenwick*.

Mr. *Speaker*. Shew Mr. *Fowler* the Letter.

Accordingly the Clerk went down to the Bar, and ſhew'd Mr. *Fowler* the Letter.

Mr.

Mr. *Speaker.* Do you know that Paper?

Mr. *Fowler.* Yes, Sir.

Mr. *Speaker.* Where have you ſeen it before?

Mr. *Fowler.* I had it from one *Webber*, that was at *Rumney*, about the 13th of *June*, as I remember.

Mr. *Speaker.* Was that the Time that Sir *John Fenwick* was Seiz'd?

Mr. *Fowler.* He was then at *Rumney*. Mr. *Webber*, I was told, had ſome Acquaintance with me, and deſired to ſpeak with me. I went to him, and he was riſing, and when up, ſays he, Mr. *Fowler*, I would deſire you to put a Letter into the Poſt, ſays he, There is no Hurt in it, it is directed to Mrs. *Francis Farrer*, at the Counteſs of *Carliſles* in *Soho* Square, and when I had deliver'd it, he deſired me to come to him again.

Mr. *Speaker.* Did you come to him again?

Mr. *Fowler.* Mr. *Maſcal* of *Rumney* ſent for me to his Houſe, and told me, That he had heard that I had received ſome Letter from Mr. *Webber*; and when he had open'd it, and ſaw what it was, he thought fit to ſend it up to the Secretary of State; and I made my Mark upon it, that I might know it again.

Mr. *Speaker.* Have you made your Mark upon it?

Mr. *Fowler.* Yes, Sir.

Mr. *Serg. Lovell.* I deſire he may be asked, Whether Sir *John Fenwick* was not in the ſame Room when *Webber* delivered it.

Mr. *Fowler.* Yes, but I queſtion whether he ſaw Mr. *Webber* give it; for he delivered it privately, as I thought.

Mr. *Speaker.* Was Sir *John* in the Room then?

Mr. *Fowler.* Yes, Sir.

Mr. *Speaker.* Can you ſay any thing more of Sir *John*'s Knowledge of that Paper?

Mr. *Fowler.* No, I know no more.

Mr.

Mr. *Serg. Gould.* If you pleaſe then, Mr. Speaker, becauſe perhaps it may be ſome Objection and expected that we ſhould give an Account of *Webber*, We will call a Witneſs, that we have done our utmoſt to find him out.

Members. No, no.

Sir *Tho. Powys.* That which I was going to offer is, That this Proof is ſhort, of that which in the Act of Reverſal of the Attainder of Mr. *Sidney*, is admitted to be no Proof againſt him; for the Act recites that a Letter was found in his Cloſet, and proved by Compariſon of Hands, and yet for all that, this ſort of Evidence is condemn'd by this Act of Reverſal, as illegal Evidence. This Caſe before you, comes ſhort of that; for here is no Proof by Compariſon of Hands, nor that it was in the Poſſeſſion of Sir *John Fenwick*: But only that a Perſon in the Room, without the Privity of Sir *John Fenwick*, delivered it to another, and the Witneſs ſays, he did it in a private manner.

Sir *Barth. Shower.* With ſubmiſſion, this Letter could not be Read in any Place whatſoever, againſt Sir *John Fenwick*, in a Civil Cauſe; for even in that Caſe, they muſt prove it to be his Hand Writing, by Compariſon of Hands.

Mr. *Serg. Gould.* I think not to inſiſt upon it. But that we ſhall deſire is this. We have now done with our Evidence, only we ſhall deſire the Worthy Member, Mr. *Vernon*, to give an Account what was the Reaſon, why Sir *John* hath not been Tryed; for indeed, he hath very much Trifled with the Government, pretending ſtill to make a Free and Ingenuous Confeſſion,

Sir *Tho. Powys.* I am of Councel for this Gentleman at the Bar; for his Life, for his Fortune, for All that he hath in the World. 'Tis not only this Gentleman's Caſe, but 'tis a Caſe that may be of Great Conſequence in all future Times. I have, as 'twas my Duty, Attended for at leaſt theſe

12 Hours, either in opening the Matter, or by producing ſuch Evidence, as we hoped we did fairly Object to. Sir, there are ſeveral Things offer'd on their Parts, which I confeſs we little expected, and which will require ſomething to be ſaid to; and I have a great deal to offer on the Behalf of Sir *John Fenwick*, both as to this Method that is taken, and what is alledged in the Bill, and what is contained in the Indictment upon which the Bill is founded, wherein I deſire to be Heard; and ſince you have been pleaſed to Allow us to be Councel for him, I am ſure we ſhall have a fair and favourable Hearing. We have a great deal to offer to you, both as to the Matter of the Indictment and the Manner of it; and I hope to ſhew you, That the Indictment, as it is laid, does not contain a ſufficient Charge of Treaſon. We have likewiſe a great deal to ſay, as to the Evidence they have offered, at leaſt what they call ſo: But I muſt make it my Requeſt, That we may have Liberty till to Morrow Morning to make our Obſervations, and Anſwer what hath been ſaid by the Councel on the other ſide. I am not in a very good Condition by this long Attendance, and by Attending my Duty in the Courts in *Weſtminſter* Hall to do my Duty here, as may be expected from me. I muſt own it, I am not prepared as I ought to be, and I hope when there is ſo great a Stake, you will allow us till to Morrow Morning?

Sir *Barth. Shower.* I beg your Favour in the ſame manner, and to the ſame effect as Sir *Thomas Powys* hath done. There are ſeveral Things offered in Evidence which are new to us Lawyers. We do not deſire time on behalf of the Priſoner by way of Delay; but in reſpect of the newneſs of the Matter and the length of the Proceedings, and that we may make that Defence that is incumbent upon us in diſcharge of our Duty to the Priſoner.

Mr.

Mr. *Speaker.* Gentlemen, you muſt withdraw.

And being withdrawn.

Mr. *Smith.* I would not give an opportunity to any Man to practiſe with Witneſſes, to hinder the Truth of the Matter appearing, after they have heard the Evidence for the Bill. I would know what Liſt of theſe Witneſſes Sir *John Fenwick* hath given in?

Mr. *Speaker.* You did make an Order, That Sir *John Fenwick* ſhould deliver in a Liſt of his Witneſſes; but I believe he did not ſend any Liſt to any Body upon that Account, for I have made no Order for any.

Lord *Coningsby.* I am convinc'd that you are obliged to ſit ſo long as to hear the Witneſſes on both ſides; and therefore my Motion is, to call in the Councel, and ask them, if they have any Evidence to produce, but I do deſire the Councel may not go on to make their Obſervations to Night.

Sir *Walter Young.* I think you are rightly mov'd by that Noble Lord that ſpoke laſt. I think if Sir *John Fenwick* hath any Evidence to produce, he ought to produce it now, and that you ought not to give him time till to Morrow Morning to produce that.

Mr. Speaker. *Is it your pleaſure that Sir* John Fenwick, *and the Councel, be call'd in, and told That the Houſe do expect, if they have any Witneſſes, that they do Examine them to Night, but as to their Obſervations the Houſe will give them Time till to Morrow Morning?*

Which was Generally Conſented to, and they were brought in again.

Mr. *Speaker.* Sir *Tho. Powys,* the Houſe have Conſider'd of what you ſaid, when you went out, and they are inclin'd to Allow you Time for making your Obſervations; but they have Commanded me to ask you, Whether you have

any

any Witneſſes to produce? And to let you know, That if you have any Witneſſes to produce, they expect you ſhould produce and examine them to Night.

Sir *Tho. Powys.* Sir, I would acquaint you with all the openneſs that becomes me on this Occaſion. I muſt confeſs, we have not any Witneſſes that we propoſe to call; but when we come to ſpeak to the Matter, we hope to give you ſome Satisfaction as to that; but at preſent, we have no Evidence to produce, unleſs it be a Copy of a Record.

Mr. *Speaker.* Sir, if you pleaſe to withdraw, you ſhall know the ſenſe of the Houſe.

Accordingly they withdrew.

Mr. *Chanc. of the Excheq.* I ſuppoſe ſince the Gentlemen have no living Witneſſes to produce to Night, you will not think fit to receive them at any other Time, for 'tis giving them too much Advantage; and the whole Meaning of the *Chicanry* of the Councel, is only to get Time to Reply, Mr. *D.* having heard the Evidence. And now I have mentioned him, give me leave to tell you, That I think you can't riſe without taking ſome Notice of him. I think there is as plain a Subornation prov'd in *D.* as can be, by one *Rowe*, and when you have heard ſuch a Character of a Man, and there is no other Evidence that he can Solicite, I think you ought to take care, that he be forth coming, and that he ſhould be taken into Cuſtody. I think you may give the Councel further Time. As to the Record, that can't well be falſified, though I believe in a matter of this moment, where the Government is concern'd, there never was ſuch a Proceeding by the Councel, as this has been to entertain us 6 or 8 Hours together, by Delays.

Mr. *Smith.* I ſuppoſe before you hear any Thing as to *D.* you will do ſomething as to the putting

ting this Cauſe off to another day, I humbly propoſe that you will go on this again on *Wedneſday*.

Sir *H. Hobart*. When 'tis proper to go upon Ways and Means, I ſhall come into it: But while this is upon your hands, I believe you will never get heartily into other Buſineſs: And therefore I humbly move you that you will go upon this to Morrow Morning.

Thereupon the Houſe came to theſe Reſolutions.

Reſolved, *That this Houſe will proceed further in Relation to this Buſineſs of Sir* John Fenwick *to Morrow at Twelve a Clock.*

Ordered, *That Sir* John Fenwick *be remanded to* Newgate, *and brought again to the Houſe to Morrow at Twelve a Clock.*

Ordered, *That the Bill be Read a Second time to Morrow Morning.*

Mr. *Ruſſel*. I am unwilling to trouble Gentlemen at this time of Night: But I would know, Whether, when Sir *John Fenwick* is called in, you will ask him any Queſtions upon that Paper?

Members. No, no.

The Councel were called in, and withdrew again.

Reſolved, *That this Houſe being informed that the Councel for Sir* John Fenwick *have no living Witneſs to produce, except to prove a Record, that this Houſe will not hear any Witneſſes, unleſs in relation to the ſaid Record.*

Ordered, *That Mr.* Dighton *do Attend to Morrow Morning.*

Memorandum *it was half an hour after Ten at the time of the Adjournment.*

Adjourned till to Morrow Morning Twelve a Clock.

Martis 17. *die Novembris*, 1696.

Ordered, That the Sergeant do go with the Mace into *Weſtminſter* Hall, and the Courts there, and the Court of Requeſts, and Summon the *Members*

bers there, to Attend the Service of the Houſe immediately.

Sir *John Fenwick* and the Councel of both ſides were called in.

Mr. *Speaker.* Sir *Tho. Powys*, you that are of Councel for Sir *John Fenwick*, the Houſe Agreed laſt Night, to give you time till to Day to make your Obſervations upon the Evidence that hath been given.

Sir *Tho. Powys.* Mr. *Speaker.* I am of Councel for Sir *John Fenwick*, who now ſtands before you upon the greateſt Concern he can have in this World; and as you have been pleaſed to Aſſign us to be of Councel for him, and I muſt own have very favourably heard us hitherto, ſo I ſhall think my ſelf very unfortunate if I ſhall let fall any Expreſſion in his Defence, that ſhall ſeem indecent, and give Offence to this Houſe, for I am ſure I have no intention to do it; but on the contrary to behave my ſelf withal the Deference that is poſſible, in a Caſe of this Nature.

The things I ſhall inſiſt upon, will be upon Three Heads.

Firſt, The Manner of Proceeding, and Method that hath been taken in this Proſecution.

Secondly, I ſhall take notice of thoſe things that are alledged againſt him in the Bill, upon which he is to make his Defence.

In the *Third* Place, I ſhall beg your Favour, to Obſerve what ſort of Proofs they have offered on the other ſide, and which they call Evidence.

As to the *Firſt* Matter, I muſt intreat the Favour of you to be thus underſtood, That when I ſay any thing in Relation to the Manner of Proceeding, I do not ſpeak in Oppoſition to the Power of Parliaments; for I know very well, that our Lives and Eſtates, and all that we have, are ſubject to Acts of Parliament; but I hope you will permit me to offer ſome Reaſons, which (I hope) may be of weight, in Oppoſition to the

the Exerciſing of that Power in the way you are now going. No Body can ſay, but when an Act of Parliament is paſſed, though the Party concerned may think it was upon hard Terms; yet when it is become a Law, it is not to be Oppoſed. I can't ſay, but thoſe Perſons, who in the laſt Seſſions of Parliament, were Impriſoned by an Act *Ex Poſt Facto*, and ſubſequent to the Fact Complained of, yet when it was paſſed into a Law, they were Legally Detained: but, I hope, I may take notice of their Caſe, as ſome kind of Reaſon againſt this, to the end that thoſe Laws may not grow familiar, that they may not eaſily be obtained; becauſe Precedents generally grow, and as that Law *Ex Poſt Facto*, extended to Liberty, ſo this extends to Life: one Precedent is apt to beget another; and therefore ſure you will be careful how you give Precedents, eſpecially in Caſe of Life.

The *Firſt* Thing I Obſerve is obvious, That is, the Perſon who is to be Sentenced by this Bill, is forth-coming, in Order to be Tryed in the Ordinary Method of Juſtice. He is not only Indicted, and actually under Proceſs, but he hath Pleaded, and he is ready when his Majeſty in the Courſe of Juſtice ſhall call upon him to undergo his Tryal; and either there is ſufficient Evidence, legal Evidence againſt him, as the King's Sergeant inſiſted there was, and if ſo, then, under favour, there is no Reaſon but he ſhould have the Benefit of an Ordinary Tryal, which is the Birth-right of all the King's Subjects; or there is not ſufficient Evidence againſt him, and if there be not, it will be a good Reaſon againſt making a Particular Law for taking away his Life: For, we think, nothing can be ſaid for this Bill but want of Evidence, and that, to my underſtanding, is a very odd Reaſon.

Sir, I would not ſpend the time in taking notice, That the meaneſt Subject is Entituled, by being born in this Kingdom, to be Tryed by a Jury, where there are thoſe juſt Advantages that can't be had in another Caſe: There is a Liberty of Challenging 35, without ſhewing any Reaſon, and as many more, as he can any way Object to, with Reaſon. The Witneſſes are upon Oath, and all the Proceedings are by certain known Rules and Methods, not only by the Statute of *Magna Charta*, but by the Common Law of *England*, much more Antient than that Statute; and though the Proceedings therein, are ſuch as a Criminal may ſometimes eſcape; yet the juſt Advantages are ſo much beyond any thing of that Nature, that I hope we ſhall never complain of that Antient Courſe of Proceeding by Jury. I am ſure it is the Honour of our Government, the Mark of our Freedom, and Envy of our Neighbours, and, I hope, that Method of Tryal ſhall never be laid aſide, though ſometimes it may not have the effect that is deſired by it.

I would take notice to you, That in a Caſe of the greateſt Crime, and moſt Notoriety of Fact, yet the Perſons concerned in it were brought to their Tryal. The Regicides, who did not fly, but were found upon the Reſtauration of King *Charles* II. though their Treaſon had the worſt effect even in the Murder of the King; yet notwithſtanding, though the Fact was ſo Notorious, thoſe that were found upon the Place were admitted to their Tryals in the ordinary Courſe of Juſtice, although at the ſame time there was a Bill of Attainder againſt ſome that fled, and ſome that were dead, and ſo could not be Tryed.

I would, with your Favour, likewiſe obſerve, That the Parliaments of *England* have been ſo far from depriving Perſons of their ordinary Tryals, that whereas the Common Law of *England* ſays, that

Perſons

Perſons Out-lawed for Treaſon and Felony, if taken, ſhall be put to Death without Tryal, yet the Parliament, in the Reign of *Ed.* VI. made a Law, providing, That Criminals that returned within a Year, according to that Act, ſhould be admitted to their ordinary Tryals.

Sir, all along, the Statutes run in favour of Tryals. There are no leſs than Two Acts of Parliament in the Reign of *Ed.* VI. in the Firſt and Fifth year of his Reign, That ſay, There ſhall not be leſs than Two Witneſſes againſt any Perſon for Treaſon: And I hope I ſhall never ſee a Law made ſo much in Oppoſition to thoſe Acts, as that a Perſon ſhall be ſentenced to Death without ſo much as one Witneſs, as I ſhall ſhew by and by.

Perhaps it may be thought Extraordinary, that in this ſame Parliament that paſſed a Bill for regulating Tryals in Caſes of High Treaſon, requiring two Witneſſes with great ſtrictneſs, and giving further Advantages to the Criminal than ever were before allowed, An Act ſhould paſs, to put a Perſon to Death, without any Tryal at all. And let any one compare the Preamble of that Act with this Bill.

Sir, I take it, with humble Submiſſion, That the preſent Caſe is not at all to be likened to moſt of thoſe Bills of Attainder that may be Cited; thoſe, when they come to be looked into, will be found either to have paſſed againſt ſuch Perſons as fled from Juſtice, and therein they only purſued the Rules of the Common Law, which allowed them to be Outlawed, and by Conſequence to be Attainted, and the Parliament therefore, in Attainting them, did but the ſame Thing, and therein, there was nothing done Extraordinary. True it is, That where Perſons have been forth-coming, there have been ſome few Bills of Attainder: But I will preſume to ſay, they are never mentioned

without heavy Cenſures, and a great Complaint a-gainſt them.

This Caſe is not like the late Inſtance of the Bill of Attainder againſt the Duke of *Monmouth*; for though he was preſent in the Kingdom, yet he was in direct Oppoſition to any Method of Tryal, he was in Defiance to all Courts of Juſtice: But here is a Perſon who ſubmits himſelf, and hath Pleaded, and ſtands ready to be Tryed, and, I hope, I may take notice, to take off all Prejudice that may be raiſed, That this Gentleman, though he was of the Parliament that paſſed that Bill, yet he was not in Town, till at leaſt a Month after the Bill was Paſſed.

I do Agree, there are ſome Caſes where Perſons have been Attainted without being admitted to be Tryed. In the beginning of the Reign of *Ed.* III. *Roger Mortimour* was Attainted, and Executed, without being Tryed; but 28 *Edw.* III. it was Reverſed, becauſe he was not brought to Judgment according to the Law of the Land, 1 *Edw.* III. The like in the Caſe of *Edmund* Earl of *Arundel*, But 4 *Edw.* III. *Richard* his Son, Petitioned in Parliament, ſetting forth the Proceedings to be a-gainſt the *Great Charter*, and inſiſting, That there ought to have been due Proceſs of Law, and he was then reſtored in part; but 28 *Edw.* III. there was an Act of Reverſal, Declaring, That it clearly appeared, that the ſaid *Edmund* was unduly put to Death, and that the Statute by which he was Attainted, was Void, Erroneous, and Null. There is an Inſtance in 32 *H.* 8. *Co.* 4. *Inſt. fol.* 37. of *Thomas Cromwel* Earl of *Eſſex*, who, though he was in Cuſtody in the *Tower*, yet he was Attainted without being Tryed: But the Words of my Lord *Coke*, are as follow, *Auferat oblivio, ſi poteſt, ſi non ulcumq; ſilentium tegat.* For the more High and Abſolute the Juriſdiction of the Court is, the more Juſt and Honourable ought it to be in its Proceedings,

and

and to give Examples of Juſtice to Inferiour Courts. And he adds further, to the end, as I apprehend. That the Rehearſal of this Attainder may be of no ill uſe: I am, ſays he, confidently perſuaded, ſuch Worthy and Honourable Members, ſhall from time to time be of both Houſes of Parliament, as never any Attainder, when the Perſon is forth-coming, ſhall be had hereafter, without hearing of him: Which I underſtand to be, without Trying of him; and 'tis memorable, what my Lord *Coke* recites, That he, who thus died, attempted the like againſt another.

There is another Caſe of *Thomas Seymour*, Admiral of *England*, who likewiſe was Attainted by Act of Parliament, and as it appears, without Execution: You have an Account thereof in the Second Part of the *Hiſtory of the Reformation*, fol. 98, 99, 100. whither I will refer you, only to read the Sentence of the Learned Author, there Pronounced againſt it: The Latter Caſe is, that of my Lord *Strafford*, which every Body knows. I ſhall, as the beſt Account of that Matter, crave leave to read the Words of the Parliament in the Act of the Reverſal. I will not trouble you with reciting the whole, but only read the beginning, and ſome part thereof in another place: *Whereas* Thomas, *late Earl of* Strafford, *was Impeached of High Treaſon, upon pretence of endeavouring to Subvert the Fundamental Laws, and called to a Publick and Solemn Arraignment and Tryal, before the Peers in Parliament, where he made a particular Defence to every Article Objected againſt him; inſomuch, That the Turbulent Party then ſeeing no hopes to effect their unjuſt Deſigns, by an ordinary Way and Method of Proceedings, did at laſt reſolve to Attempt the Deſtruction and Attainder of the ſaid Earl, by an Act of Parliament, to be therefore purpoſely made to Condemn him upon* Accumulative *Treaſon* —— And then it goes on to ſhew, it was carry'd by the Tumult of the People, and

then follows — *And to the end that Right be done to the Memory of the Deceaſed Earl of* Strafford *aforeſaid; Be it further Enacted, That all Records and Proceedings of Parliament relating to the ſaid Attainder, be wholly Cancelled and taken off the Fyle, or otherwiſe Defaced and Obliterated, to the intent the ſame may not be viſible in after Ages, or brought into Example to the Prejudice of any Perſon whatſoever.* So that the Parliament that Enacted that Reverſal, did Conſider thoſe Proceedings as very Evil and Unjuſt, and was not willing there ſhould be any Remains of ſuch an Example to future Ages.

Sir, having made theſe Obſervations as to the Manner of Proceeding I come now to that which is the Subject Matter of the Bill at preſent before you, and which we take to be the Charge againſt Sir *John Fenwick*: I muſt crave leave to Obſerve, That in all Courts of Juſtice, where any Perſon is Accuſed, he is to make his Defence *Secundum allegata & probata*: 'Tis not enough that a Matter is proved, if it be not alledged; nor that it is alledged, if it be not proved: But if it be both alledged and proved, then it is a full Charge, and requires an Anſwer. It is not only the Law of *England*, but I believe, of all Nations, and where ever any Perſon is to make his Defence, eſpecially in Capital Crimes, that to which he is to Anſwer muſt be alledged againſt him, from whence I ſhall Obſerve what is alledged againſt Sir *John Fenwick*, for, I hope, we are not concerned to defend him further than as to what at this time he is Charged with. This Bill of Attainder, as it is drawn, and now ſtands before you, doth not ſo much as alledge, or ſay, That Sir *John Fenwick* is Guilty of the Treaſon whereof he was Indicted, and that hath prevented us from producing Witneſſes to that, and ſeveral Matters which the King's Councel have entered upon: For though you have permitted them to Examine Witneſſes to ſeveral things quite out of the

Bill;

Bill; yet, I hope, you are not come to any Reſolution, That theſe Matters ſhall be thought fatal to Sir *John Fenwick*, that are not ſo much as alledged againſt him. We do not therefore think we are bound, or ought to follow them in thoſe things that are totally out of the Bill; and therefore his being Guilty, is not now the Queſtion, becauſe 'tis not a Charge upon him.

The firſt thing that is alledged in the Bill is, That Sir *John Fenwick* was Indicted at the Seſſions, for that which is laid in the Indictment to be Treaſon (by and by I ſhall crave leave to be heard to) and, I think no Body will ſay this alone does require any Anſwer, further than to own the Fact or deny it: And we do Admit that he was ſo Indicted. I need not labour much to clear him of the Conſequence of that alone; for very often Innocent Perſons have been Indicted and Accuſed, (for an Indictment is no more than an Accuſation) and this Bill, as I have obſerved, doth not ſay he is Guilty. When the Bill hath recited that Matter, it proceeds to take notice, That he by ſome unfair Prevarications (for ſo I agree they were, if the Facts alledged in the Bill are true, which by the way hath not been yet proved, by producing any one Witneſs) did obtain the King's Clemency to put off his Tryal, in expectation of an ingenuous Confeſſion, which the Bill takes for granted he hath prevaricated in, by Charging ſeveral Perſons of Honour and Fidelity with Matters of a high Nature, only by Hearſay, and by uſing other unfair Artifices to put off his Tryal. How far it is made out, that I muſt ſubmit to you, we think at preſent there is no proof of it, and by Conſequence we are not concerned to anſwer it: But had they proved it as fully as it is laid (though far be it from me from excuſing ſuch a Behaviour) yet when a Criminal is to be Tryed for that which

will be of fatal Conſequence to him if he be Convicted, no Body can ſay it comes near Treaſon, by unfair means, to contrive to put off his Tryal.

The next Thing the Bill recites is, That one of the Witneſſes who might have been produced againſt him upon his Tryal, if it had proceeded as was intended, is ſince withdrawn. I can't ſay, but *Goodman* is withdrawn, But as the Bill does not ſo much as alledge, That it was by the Means or Procurement, no nor Privity, of Sir *John Fenwick*; ſo from thence that part of the Bill Charges no Offence home to Sir *John Fenwick*: For in Caſe the ſame Witneſs had hapned to have dyed by the Act of God, It would not have been ſaid to have been a good Reaſon for this Bill of Attainder againſt Sir *John Fenwick*, unleſs he had contributed to it.

From theſe Premiſes follows the Enacting part, That Sir *John Fenwick* be Attainted of High Treaſon; and in future Times the Act muſt be ſuppoſed to be grounded upon the Inducement to it. And I humbly ſubmit it to you, Whether this Bill Condemning him for High Treaſon, upon ſuch Recitals, will be thought to be reaſonable?

Theſe being the Allegations of the Bill, I will now, with your Favour, come to that which they on the other ſide do call Proofs; and I muſt humbly obſerve to you, and ſubmit it to your Judgment, Whether in a Caſe where a Man's Life is to be taken away, by a ſubſequent Law made on purpoſe for him, the Proofs in that Caſe ought not to be much more Evident, than if he were to be tryed by a Law already in Being? In my poor Apprehenſion (I ſpeak it with all Submiſſion to you, Sir,) It would be too much at once to make a ſubſequent Law to condemn a Man to Death, and to do it upon doubtful and uncertain Evidence, or rather upon no Proof at all. Nothing could Excuſe ſuch a

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Law, but an undeniable Proof of the Fact. And therefore ſurely the Poſition we find of Mr. *St. John*'s, in my Lord *Strafford*'s Caſe, is of moſt dangerous Conſequence. I am afraid none are ſafe if that be admitted, That a ſubſequent Law may take away a Man's Life without any Evidence, other than the private Opinion or Conſcience of every particular Law-maker. He is pleaſed ſo to aſſert, That it may be done as in *Ruſhworth*'s Hiſtory of that Tryal, *fol.* 677. I am ſure if this be ſo, no Man knows how long his Life is his own: I hope this Doctrine ſhall never be followed or approved. Sir, we have the Happineſs to live under an Eſtabliſhment that every Man does, or may know the Law he is to go by: Every one is bound at his Peril to take notice of the Laws, and to act accordingly, becauſe they may be known, but at this Rate none but Prophets can live among us.

In the next place, I would obſerve what Courſe they have taken in their Evidence who are the King's Counſel.

Firſt, They have betaken themſelves to that which is not Alledged in the Bill; and we think that is not agreeable to a Courſe of Juſtice.

In the next place, to make out that they inſiſt on, they have produced but one Perſon that comes hither *Viva Voce* to ſpeak to it; and I muſt take Notice to you, That he is not upon Oath. I know very well it is not your Courſe in this Houſe to adminiſter an Oath; yet, I hope, that is ſo far from being a Reaſon why this Bill ſhould paſs here, without an Oath, that it is a good reaſon why ſuch a Bill ſhould not begin here. There is no Place in the World where a Perſon is ſentenced to Death without an Oath. In the Caſe of my Lord *Strafford*, the Proceeding firſt was by way of Impeachment, and the Witneſſes had been firſt examined upon Oath in the Houſe of Peers, and that Bill of Attain-

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der takes notice of it, reciting that it had been fully proved, and, by Conſequence, we may ſuppoſe that they would not otherwiſe have paſſed it, that being the Ground of their Proceeding upon that Bill of Attainder: But for the Bill to begin Originally in this Place, to form ſuch a Judgment, the Heavieſt that can be pronounced againſt a Man, a Judgment of Death, corrupting of his Blood, and forfeiting all he has in the World; and this upon bare Allegations, without ſo much as the Sanction of an Oath, is extreamly hard. Mr. *Porter* is ſuch a Perſon, that I know not how he hath gained ſo much Credit, that this Act ſhould paſs upon his Parol to take away the Life of a Man. He was lately of that horrid Conſpiracy for the Aſſaſſination of the King; and ſhall that Man who was ſo lately of that villainous Diſpoſition to be ingaged in a Crime of that Black nature, and not Convicted by his own Conſcience, but by the Danger he had run himſelf into, not ſo much as Pardoned his Crime but at this time, if I may without Offence uſe that Expreſſion, Drudging for his Pardon, I ſay ſhall this Perſons Life be taken away by his Parol?

Sir, the next Thing I would go to, is that (which likewiſe they call Evidence) which is an Examination, as they term it, of *Goodman*, taken before a Juſtice of Peace: But he was not Examined, and I muſt inſiſt upon it, That though you permitted it to be Read, yet I did obſerve you did not declare it to be Evidence, but you were, I preſume, willing to hear all Things, and then judge what would be Evidence. And, I think, the King's Councel did not preſs it further. Sir, as this is not Evidence that would be allowed in an inferior Court, ſo I hope, you will not allow it to be Evidence here; for then it is like to be followed by other Courts, who obſerve the Proceedings here as their great Rule. 'Tis only what

Mr.

Mr. *Goodman* thought fit to write down without being Examined.

Sir, the next Thing they reſort to, is, What *Goodman* Swore upon his Examination in another Cauſe where Sir *John Fenwick* was neither Party, nor Preſent. Sir, there are, I ſuppoſe, ſuch Reaſons againſt that ſort of Evidence from natural Juſtice, that it is not admitted in any Court; becauſe there may be a weak Defence, or the Perſon that ſwears it againſt one, perhaps may not, when Face to Face, have the Confidence to perſiſt in it, in Caſe it be falſe againſt another, or at leaſt that Perſon, who was not a Party before, when he comes upon his Tryal, may think of ſuch Queſtions as may go a great way to diſcover the Truth, may produce ſuch Evidence againſt his Credit as may overthrow it.

But if what is Sworn at one time againſt one Man muſt be always taken for Truth againſt all others, the Tryal of one in the Company is the Tryal and Condemnation of all the reſt. And how contrary is this to a fundamental Rule in our Law, That no Evidence ſhall be given againſt a Man, when he is upon Tryal for his Life, but in the Preſence of the Priſoner; becauſe he may croſs Examine him who gives ſuch Evidence, and that is due to every Man in Juſtice.

But I would with Submiſſion inquire, How they are ſure that *Goodman* would have ſworn this Matter again, if he was now forth-coming? Becauſe he did ſwear ſo in *Cook*'s Cauſe, is it neceſſary that he would ſwear ſo again now, if Face to Face, with Sir *John Fenwick*? No Body can ſay ſo poſitively and abſolutely; they only can imagine it, becauſe he once ſwore it, therefore it is probable that he would do ſo again: Whereas, we may as well ſay, he did then ſwear it to ſave his own Life, and having done that and found an Opportunity to get out of the

the way, his own Conſcience put him upon flight, to prevent his doing of it again, and that might be the Reaſon for the withdrawing of himſelf. However, I inſiſt upon it, That there is no Proof that it was by the Procurement of Sir *John Fenwick* that he withdrew. The Bill does not alledge it, and the Proofs do not come up to it: Nay, there is nothing offered to ſuch Purpoſe, ſave only that Mr. *Porter*, was pleaſed to ſay, That another Man told him, that the 300 Guineas he was offered, and 300 more he was to have received, were to have come from Sir *John Fenwick*: But hearſay Evidence is to be rejected, eſpecially againſt a Man for his Life, becauſe every Man is at Liberty to talk at large: But God forbid that that ſhould be allowed for Evidence.

The next Thing they went upon was what Mr. *Roe* ſaid, That Mr. *Dighton*, who by your Permiſſion is Solicitor for Sir *John Fenwick*, was inquiring of him what he could ſay to take off *Goodman*'s Evidence: The Words I think he uſed were, What he could ſay to diſcredit *Goodman*'s Evidence, and, I hope, that does no way affect Sir *John Fenwick*. For it does not appear that he had therein any Authority from him; but 'tis only ſuſpected, becauſe he is now Solicitor for him, which he was admitted to after the time ſpoken of. But I take the Words to be nothing relating to *Goodman*'s withdrawing of himſelf; but to enquire what he could ſay to diſcredit his Teſtimony, which ſuppoſeth he would appear, and imports the quite contrary of withdrawing himſelf: And if he had gone no further, I think, there had been no Fault in that; for any Solicitor may enquire up and down for the Advantage of his Client, and the Word *Solicitor* imports his Employment. As to the offer Mr. *Roe* ſays he made him, of a very great Recompence, How far he is Guilty of that, I ſuppoſe, he can

give

give ſome Account, if you ſhould pleaſe to enter into the Examination of it, and as I find he does not doubt to clear himſelf: ſo that Sir *John Fenwick* is in no ſort proved to be privy to Mr. *Goodman*'s withdrawing himſelf, much leſs to have had a Hand in it.

There is one Thing more I would offer, and that is Grounded upon the Bill of Indictment preferred at the *Old Baily* againſt Sir *John Fenwick*, That the Matter in the very Indictment that they have Read on the other ſide, as it is there laid, and as far as it hath been offered to be here proved, does not amount to Treaſon; or, at leaſt, it hath been made a very great doubt, and by ſome within theſe Walls: But this I offer, with all Submiſſion, I have the Author in my Hand, who is a Perſon of Note of the King's Counſel, he hath furniſhed me with ſuch Arguments as, I hope, I may be admitted to put you in mind of without Offence.

The Indictment lays, That there was a Conſpiracy and Agreement to call in Foreign Power, and to that purpoſe to ſend *Charnock* to *France*; but the Indictment does not ſay, That *Charnock* was ſent, only that there was a Meeting, and an Agreement, and a Conſpiracy, to ſend him: So the Indictment does not Lay it as a Thing done, nor does the Bill Charge it ſo; but only takes Notice, That he, I mean Sir *John Fenwick*, was Indicted for Conſpiring and Agreeing to call in a Foreign Force, ſo that this Bill does not ſay that *Charnock* was ſent. And I appeal to you, Whether it be proved that he was ſent? For Mr. *Porter* ſays no more, But that there was a Meeting at the King's Head, and he named Sir *John Fenwick* to be one who was preſent; and there it was, he ſays, agreed, That *Charnock* ſhould be ſent into *France*. Now, if there was nothing more than an Agreement and Conſpiracy

ſpiracy to do it, and no further Act, but ſuch a Meeting to do it, but the Perſon was not actually ſent, or, at leaſt, not proved to be ſent; then, from this Learned Author's Opinion, I inſiſt upon it, That this is not a ſufficient Overt-Act of Treaſon. In the late Caſe of my Lord *Ruſſel*, whoſe Innocency is vindicated by this Author, he takes notice, That a Conſpiracy or Agreement to Levy War, is not Treaſon, without actual Levying War; and of that Opinion was my Lord *Coke*, and my Lord Chief Juſtice *Hales*. A Conſpiracy or Agreement to call in Foreign Forces, unleſs actually done, or a Perſon, at leaſt, actually ſent, or ſomething more than a bare Agreement for that Purpoſe, is the ſame as a Conſpiracy to Levy War. And in the Caſe of my Lord *Ruſſel*, the Proof being only, That he, and others, met together, and agreed to ſeize upon the Guards, and Levy War, which he never actually did, it is inſiſted upon by this Author, That that was not Treaſon; for that Indictment went no further. And therefore my Author ſays, Show me where ſuch an Accuſation was ever agreed to be more than a Conſpiracy to Levy War? And that ſuch a Conſpiracy was ever agreed to be Treaſon within the Statute of *Edward.* 3. till within theſe few Years.

Sir, now I muſt humbly ſubmit it to you, Whether this be any Thing more? And for the purpoſe you will pleaſe to conſider, What this preſent Bill in Parliament, and what that Bill of Indictment recited in it is: For it is not, that *Charnock* was ſent into *France* to ſolicit Foreign Forces; but only that Sir *John Fenwick* was at a Meeting, where they did agree ſo to do. Calling in Foreign Forces is Levying War, but Conſpiracy to Levy War is not Treaſon, unleſs it be actually done: A Conſpiracy to call in Foreign Forces is nothing more. And therefore I hum-

humbly inſiſt upon it, That neither by this Bill or by the Indictment recited in it, or the Proofs offered before you, any Thing is Charged, but only an Agreement at that Meeting mentioned by Capt. *Porter*, a ſingle Perſon, and he not upon Oath, to call in Foreign Forces. For he only ſays further, That *Charnock* told him he had been in *France*. I ſhall not trouble you any further; we have not thought fit to produce Witneſſes, for the Reaſons I have offered: For that we do not find, That Sir *John Fenwick* throughout the Bill is Charged with being Guilty of Treaſon, and we are not willing to enter upon the Defence of a Matter not Charged upon him. I hope, Sir, you will not make a Precedent, That where a Perſon is Indicted, and ready to abide his Tryal in the ordinary Courſe of Juſtice, as Sir *John Fenwick* now is, that he may be taken out of the Hands of the ordinary Judges, and be brought to this Bar, to receive his Tryal here.

A Matter of this Nature may be of very great Conſequence: We know at preſent upon what is Ground we ſtand, for by the Statute of *Ed.* 3. we know what is Treaſon; by the 2 Statutes of *Ed.* 6. and the late Act of Treaſon, we know what Proof; by the Statute of *Magna Charta*, we know how we are to be Tryed *per legem terræ & per judicium Parium*, That is, a Peer by his Peers, and a Commoner by a Jury; but if Bills of Attainder come into Faſhion, we ſhall neither know what is Treaſon, what is Evidence, nor how, nor where we are to be Tryed. Sir, I ſubmit it to you, and hope this Bill ſhall not paſs.

Sir *Barth. Shower.* Mr. Speaker, Being of Councel for Sir *John Fenwick*, the Priſoner at the Bar; I am firſt humbly to thank you for your Candour, of which I have had frequent Experience; and humbly beg for my ſelf, That if I offer any Words that are indecent, or unfit for me, that you

you will interrupt me, for it is furtheſt from my Intention ſo to do.

The Bill that is brought into this Houſe againſt Sir *John Fenwick*, is that whereby every one of you (with Submiſſion) are to Declare and Pronounce, *That he ſhall be Drawn, Hanged and Quartered, as a Traytor.* And the Queſtion before you is, Whether you will do this in this Caſe?

Sir, I ſhall not pretend to queſtion, nor enter into any Debate or Argument in this thing concerning the Power of Parliaments: No queſtion, but in all Governments, there is ſome Supream Power; and by our Conſtitution, it is lodged in the King, Lords and Commons.

There are Precedents of Attainders, and thoſe many; but can they ſhew me, where there hath been any Attainder by Parliament, for High Treaſon upon one ſingle Act, Which if Treaſon, was Determinable at Common Law. There have been Bills of Attainder for Flagrant Treaſons, committed by Great Miniſters of State, ſome Topping Sinners, who have been above Judges and Jury, and whom Inferior Courts could not deal with: But I believe I may ſay this, That for a private Conſult or Agreement between four or five Private Gentlemen, in a Private Room, from which there was no Danger, but by the Conſequence of the Reſolution of it when put in Practice, no Man can ſhew any Precedent for Attainting any Perſon in Parliament.

Sir, If you pleaſe to obſerve the 25 *Edw.* 3. reſerves the Power to the Parliament, to proceed in Treaſon not expreſſed within the Statute; but as to the Compaſſing the King's Death, adhereing to the King's Enemies, and thoſe things that are there particularly ſpecified, it ſeems the Senſe of that Parliament to leave them to the Rules of the Common Law. So 1 *H.* 4. *No.* 144. on the Parliament Rolls, it is at large Complai-

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ned of Accuſations in Parliament for Treaſons and Felonies and it is Declared for the future, They ſhould be Determined in the Inferior Courts.

This was occaſioned by Sir *Ra. Ferriers. Cotton's* Abridgment, 189.

There is a Melancholy Precedent or two of ſingle Acts of Attainder; but they are moſt of them Reverſed. Sir *Thomas Haxey* in *Rich.* the 2d's time, was Attainted for bringing in a Bill into the Commons Houſe againſt the Prerogative; but 1 *H.* 4. it was Reverſed with great Cenſure, *Cott. Abridg.* 362, 363. There are others in *H.* 8. time, but they were for Acts in that Reign, which were queſtionable, Whether or no within the Statute of *Edw.* 3. and were for ſuch Actions, as perhaps were not for the Honour of the Prince, or good of the Government, to diſcloſe by Publick Tryal, as the Attainder of the Queen, and others concerned.

I beg leave to repeat the Words of a great Author, the Biſhop of *Salisbury*, in the *Hiſtory of the Reformation*, which I crave leave the rather to do, becauſe it hath been approved of by this Houſe, for he had thanks of the Parliament for it; fol. 359, 360. where ſpeaking of theſe ſort of Attainders, he ſays, *After theſe Executions, followed the Parliament in* 1539. *in which theſe Attainders were not only Confirmed, but divers others were made of Perſons in Cuſtody, without bringing them to Tryal*; (and he ſays) *which can't be enough Condemn'd as a breach of the moſt Sacred and unalterable Rules of Juſtice.*

That of the Marchioneſs of *Exeter*, &c. I ſhall make no Paraphraſe upon it but ſubmit it to your conſideration: There is no queſtion but you will Agree, and I muſt Admit, *Salus Populi* to be *Suprema Lex*; but for an Act, not the laſt *May*, but laſt *May* was Twelve Months, the danger

paſſed, the Perſons Executed that were Concerned in the Great Treaſon, and all danger that might have been from that Act gone, and no fear now concerning it, I hope you will not uſe the extraordinary Power of the Legiſlative to puniſh it.

The Reaſon ſuggeſted in the Bill is, That 'tis impoſſible to have this Gentleman Tryed by the Rules of the Common Law, for otherwiſe there is none, For you will not waſt your time. And if the Doctrine that was broached here yeſterday, be true, there is no occaſion to trouble you now; for according to their Doctrine, there is legal Evidence, and there is no need of a Bill of Attainder: but taking that for granted, that we muſt do (otherwiſe there is no Reaſon for this Bill) Then the Bill ſays, That *Goodman* was an Evidence, and that he is withdrawn; which I muſt obſerve, is neither laid nor proved to be by the Privity, Conſent, or Procurement of Sir *John Fenwick*: There is no pretence of it in the Bill, no Inſinuation of it, nor any Evidence to that purpoſe. Then ſuppoſe *Goodman* is withdrawn, we may preſume you will not paſs a Bill to put Sir *John Fenwick* in a worſe Condition than if *Goodman* was preſent, if he had been ready to have Sworn the ſame thing.

In caſe you do paſs this Bill, you do put Sir *John Fenwick* in a worſe Condition than he would have been if *Goodman* were here. Perhaps it might be reaſonable to have an Act paſſed, That *Goodman*'s Depoſitions ſhould be Read at the Tryal, if *Goodman* was withdrawn; but we hope it can't be a Reaſon to Condemn Sir *John Fenwick* of High Treaſon without Tryal; for the Conſequence of this is (if it were by his means) that he is Puniſhed greater than the thing requires. For if *Goodman* was here, Sir *John Fenwick* would have had his Tryal by a Jury, the Benefit of Challenges,

ges, Exceptions to the Array, might have Challenged upon Account of Favour, if any of the Grand-Jury had been Impannelled, had his legal Exceptions to the Teſtimony of the Witneſſes, might have theſe Witneſſes Examined upon Oath, might give Evidence upon Oath in Anſwer to it, and all this he is deprived of: So that now he is in a worſe Condition by *Goodman*'s Abſence than if he was preſent. We inſiſt upon it therefore, and ſubmit it to you, whether any Puniſhment ſhall be Impoſed by the Legiſlative Power, but only to ſupply that Defect, and put the Caſe in the ſame Circumſtances it would have been, if ſuch a Miſcarriage had not been Committed. But this Bill is to condemn him to Death upon the Oath of one Witneſs, tho' your Act of Parliament laſt Year requires two. With ſubmiſſion to their Judgment, it was the Law of the Land, before that, and 'tis the Law of God, and the Law of the whole World, and no Law allows a Man to be Condemned but by two Witneſſes; and the Reaſon that here in other Caſes one Witneſs is Admitted, is becauſe the party hath the Benefit of a Jury, and Challenges to them, who the Law ſuppoſes are privy to the Fact, and therefore are to come from the Vicinage, from the Neighbourhood of the place where the Party dwells. And for that Reaſon, in Caſes of Felony, where no Statute interpoſes, the Law allows but one Witneſs. Natural Reaſon requires two Witneſſes in caſe of ſo great Crimes, becauſe that one Witneſs can be no Rule to guide your Judgments. One affirms, the other denies, this is equal, and Preſumption ought to be on the ſide of Innocency, rather than otherwiſe. But we hope, in this Caſe, it will not be thought reaſonable to paſs the Bill to Condemn Sir *John Fenwick* for Treaſon, and to Condemn him to the baſeſt of Exe-

cutions, upon the Teſtimony, nay upon the Parol of one Witneſs. And 'tis no more than if *Goodman* had been dead, then you would not have done it. If *Goodman* and *Porter* had both come to this Bar, you would not have done it, but have referred him to his Tryal at the Common Law: Now what is there pretended by them to induce you to Judge the contrary, or at leaſt without ſo much as an Allegation in the Bill, that Sir *John Fenwick* procured his withdrawing. I propoſe it to your Conſideration, Whether there be any Proof, that *Goodman* is withdrawn? He was once in Cuſtody, let out upon Bail, the Proſecutors approved the Bail, he never yet called upon his Recognizance, nay, there is not one tittle of Evidence, but that *Goodman* may be in the ſame Lodging where he was: And then, ſuppoſe when you have paſſed this Bill, *Goodman* ſhould appear again and contradict the Teſtimony he has given before, Then it may be too late for you to do right to Sir *John Fenwick*. 'Tis not ſo much as offered that *Goodman* could not be found, they offered a Printed Proclamation, which I am ſure the King's Sergeant will not allow to be any Evidence, Whether it paſſed the Great Seal before it was Printed, or whether it paſſed it at all, *Non Conſtat*, for it was not Read, they waved it. It does not appear Sir *John Fenwick* Conſented, or Procured *Goodman*'s withdrawing; he could not Procure it, for he was a Priſoner, and ſo not likely to effect it, being a Priſoner, eſpecially for his Life.

As for my Lady *Fenwick*, whether ſhe did ſo or not, I am ſure you'll be of Opinion, it ought not to affect Sir *John Fenwick*: Suppoſe *Clancy* a Stranger to Sir *John Fenwick*, and in Truth he never ſee him; Or ſuppoſe him a Friend, and he Officiouſly did what he did, he ought to anſwer for it, and I think he hath undergone

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the Puniſhment the Law thought fit to inflict in that Caſe, 'tis his own Crime, and by the Rules of Juſtice, no Man's crime ought to tend to the Puniſhment or Misfortune of another Man: The Act of one Criminal, tho' thought to be a Party, or Acquaintance, or a Friend of Sir *John Fenwick*'s, ought not to affect him, nor any body but the Actor, and 'tis he that hath Suffered for it.

And what hath been ſaid in that Matter, ought not to influence your Judgments, for 'tis not improbable, but what *Clancy* told *Porter* is falſe; you will never allow Hear-ſay, nor permit your Judgment to be Governed by any thing but what is certain, and hath all the Moral Rules of Perſuaſion. Hear-ſay was never by any Law, in any Court of the World, allowed, nor indeed believed in Private Converſation.

As to my Lady *Fenwick*, there is this further, That Husband and Wife, in reſpect of Crimes, are diſtinct Perſons, and what one does, cannot affect the other, no more than ſhe deſerves to be Executed for what Sir *John Fenwick* did. And as to what *Porter* ſays concerning it, it only relates to himſelf, it proves no Suggeſtion of the Bill, which is, that *Goodman* is withdrawn. Becauſe a Stranger to Sir *John Fenwick*, (and it muſt be ſo in Conſtruction of Law) made an Attempt upon Capt. *Porter*, therefore *Goodman* being withdrawn, there was an Attempt upon him, and by the ſame Perſon, and by the ſame Means; this, is no Evidence, 'it carries no Logick in it, and won't prevail upon your Judgment.

We offer another thing to your Conſideration. 'Tis ſaid, that one *Roe* was ſpoke to by a Solicitor of Sir *John Fenwick*'s, Whether or no he could ſay any thing to the Diſcredit of *Goodman*, as to his Robbing or Clipping: The asking of that Queſtion was Lawfull and to deſire him to teſtifie

it was Lawful: I muſt agree, to offer too great a Sum of Money, may ſubject him to an Information in the *King's-Bench*, (but Mr. Attorney knows that beſt) but God forbid it ſhould affect Sir *John Fenwick*: Mr. *Dighton* was not his Solicitor at that time, not appointed, nor had any Liberty to come to him. Beſides, it can't be an Evidence, nor can't induce you to believe, That the ſame Perſon was Inſtrumental to get away *Goodman*, becauſe he asked *Roe*, if he knew *Goodman* to be guilty of thoſe Crimes; for there is no Evidence that he asked him or did perſuade him to withdraw himſelf.

There's another thing we could offer to you; There's no Proof of that, which upon the firſt Reading of this Bill was aimed at, to be Puniſhed with greater pains than the Common Law inflicts, and that is the giving of falſe Papers and Accuſations againſt great Perſons. They have not attempted any thing like it; ſo that that is to be taken as if there was no ſuch thing. Neither is there any Proof of Protracting his Tryal, by any Promiſes of Confeſſion or Diſcovery; they opened it, but did not Attempt the Proof of it, but waved it.

But take it to be ſo; I hope you will not paſs an Act to Attaint a Man for making a falſe Accuſation, which only incurs an Action of *Scandalum Magnatum*, or Fine and Impriſonment upon an Indictment; and, I hope, you'll not Condemn him to a greater Puniſhment, when at the time he did it, he had no notice of that Puniſhment. The deſign of the Law, is to influence Men by fear of Penalties, and how can that be, when Penalties are not known at the time the Fact was Committed? I ſpeak with Submiſſion ſtill, it ſeems not likely, that I ſhould forbear with ſo much Caution from an Action that expoſes me to the Penalty of 20 *l.* as from an Action for which

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the Law ſays, I ſhall forfeit my Life: Now, Sir, in this Caſe, it might be expected that he ſhould incur the Penalty of Fine, Pillory or Impriſonment, but not that he could incur the Penalty of Death.

Then, Sir, as to the Protracting of his Tryal by ſuch Promiſes of Confeſſion. Certainly the putting off his Tryal, in it ſelf, is ſo far from being a Crime, that it can't be thought but Lawful; 'tis every Man's Duty, upon the Principle of Self-preſervation, and it was at the Liberty of the Government and Miniſters to do as they thought fit in it.

In the next place we do inſiſt, That there is no Treaſon alledged nor proved in this Caſe, There is no pretence of Truth in reſpect of the Aſſaſſination, or of buying of Arms or Horſes, though mentioned in the Indictment: And if Sir *John Fenwick* had been to have been Tryed upon this Indictment, and they had both theſe Witneſſes there, all that would have been proved, would have been the Conſult; as to the reſt, he muſt have been found not Guilty: And I believe 'tis moſt notorious, that the whole Company there, could not have raiſed what was talked of. Now as to this ſingle Act, it hath been ſaid, That a Conſpiracy to Levy War is not Treaſon. My Lord *Ruſſel* was Attainted for it, but that Attainder was Reverſed upon this very Account, and the Act declares the Reaſon of it, he being deny'd his Lawful Challenges, and that by ſtrained Conſtruction of Treaſon, he was Unlawfully Convicted of Treaſon. Now the Overt-Act in the Indictment was this, that my Lord *Ruſſel*, and others, did Conſult and Conſpire to Seize the King's Guards: The Proof of it went further, That they ſent Sir *Tho Amſtrong* to view them, and Seize them; But then the Queſtion is, *Whether the Conſulting to ſend a Man to Invite Foreign Forces, is*

any more than a Conſult to ſeize the King's Guards? We ſay each are Levying of War, and 'tis not within the Clauſe of Adhering to the King's Enemies; for they muſt be either preſent Aiding and Abetting of them, or ſending them Money, Arms and Ammunition, and the like; and I think, for that, I may Appeal to your Act made againſt Correſponding with the King's Enemies, which I ſuppoſe, if the Law before was otherwiſe, it needed not to have been made. Now here is only a Conſult, and Agreement to do this Act.

It hath been Queſtioned, Whether *Scribere eſt Agere*, But here 'tis only *Mittere?* nay, it is not ſo much, 'tis only *Agreare Mittere*, Six Men had between them a little Private Diſcourſe, and at laſt they did agree to ſend *Charnock* to *France*: The Queſtion is, Whether the Law of the Land will Warrant this to be Treaſon? And if not, then you will not Paſs this Act upon ſuch a ſingle Point. Dr. *Story's* Caſe is deny'd to be Law. This Caſe is no more than that in my Lord Dyer for Writing a Letter to invite the *Spaniſh* King to Invade *England*, and it was a time of great fear of them, as it is of the *French* King now, and he was Attainted upon that, but that Judgment hath been queſtioned and denyed to be Law. My Lord *Hales* expreſly, in his Pleas of the Crown ſays, That a Conſpiracy to Levy War, is not an Overt-Act of the King's Death, and that Attempting to Levy War is not Treaſon. The ſorts of Treaſons are theſe Three, Compaſſing the King's Death, Levying War, or Adhering to the King's Enemies, Now for Compaſſing or Agreeing to Levy War, to apply that to be an Overt-Act of Compaſſing the King's Death, hath been always complained of as a ſtrain of the Law.

Upon theſe Reaſons, we think this would not have been an Act of Compaſſing the King's Death

Death as laid in the Indictment; and then if it be but a Queſtion, *Whether it be or no?* We hope you will not Proceed in your Legiſlative capacity, eſpecially when he is deprived of the Advantage of inſiſting on this at a Tryal at Common Law. Witneſſes are there upon their Oaths, he might have had a Challenge to the Jury, he might move in Arreſt of Judgment. Now the Queſtion is, Whether you will pronounce Sentence of Death upon him for High Treaſon, upon one ſingle Act, a Year and half ago, juſt after the Act of Parliament for Regulating Tryals in Caſes of High Treaſon. If we had had a Tryal at Law, we ſhould have Canvaſſed theſe things, and had Witneſſes upon their Oaths, for the Pardon reached the 29th of *April*. They could Swear no New Diſcourſe but juſt in *May*, and now they ſay it was in the middle of *May*, if it had been before, the King's Grace would have Exempted Sir *John Fenwick* from Puniſhment. Theſe things we ſhould have had the Advantage of, if we had the Liberty of a Tryal.

There's another Conſideration, Sir *John Fenwick* hath Pleaded, and hath Pleaded to Iſſue, and Iſſue is joyned, and a *Venire Facias* is Awarded. Now we ſubmit it to you, whether you will think fit to take it out of the Hands of the Common Law, when there is no Extraordinary neceſſity upon the Conſiderations we have to offer to you. If you do not caſt out this Bill, if we ſhould have the good Fortune as we hope for in another place, Sir *John Fenwick* ſtands ſtill liable, and muſt ſubmit to his Tryal, if the King's Councel think fit to Proſecute him: and we think it hard to undergo your Cenſure, to be Condemned in this place; and if (perhaps) he be Acquitted here, to undergo the like danger in another, and then to be Tryed in a third. And for theſe Reaſons, we hope, you will Reject this Bill.

Mr.

Mr. *Serg. Gould.* May it pleaſe you, Mr *Speaker*, I have hearkened to what theſe Gentlemen have Objected, but could not be aware of all they have ſaid. They have enlarged upon ſeveral Topicks, I ſhall recollect them as well as I can, and Anſwer them in the Method they have taken. I never did think, that the Parliament would take things out of the Ordinary Courſe of Juſtice, nor Attaint any one of Treaſon, unleſs in Caſes Extraordinary, and theſe Gentlemen have Agreed, That in Caſes Extraordinary they have done it. They likewiſe have Agreed, and Sir *Barthol. Shower* has told you, That there are ſome Treaſons by the Statute of 25 *Ed.* 3. reſerved to be Declared by Parliament. Sir *Thomas Powys* ſays, This is taken out of the Ordinary Courſe of Juſtice. So ſays Sir *Barthol. Shower*, ſays he, Here is an Indictment before you, the Party hath Pleaded not Guilty, and he may be Tryed in the Ordinary Courſe of the Law, and therefore they look upon it as improper to bring it here.

The Gentlemen are miſtaken very much, to think that I did ſay, That the Examination which I offered as Evidence here, would be allowed below. If I had thought ſo, I ſhould have thought at the ſame time, this Houſe would not have meddled with it: But I do diſagree with them in this, and take it, That where a Caſe is Extraordinary, you will interpoſe. Here is an abominable Treaſon, that is Agreed on all Hands; Here is Plot upon Plot, here hath been a Plot now to take away the King's Evidence. There were two Witneſſes in the beginning, and 'tis very plain that one of them is not here now. For that, here was a Proclamation produced, and, I did look upon that Matter as taken for granted, That *Goodman* was withdrawn, and for that they may be eaſily ſatisfyed. They ſay, we have not

proved

proved the Suggeſtions of the Bill; but we think we have. For firſt of all, Captain *Porter* hath here Sworn it expreſly, it is not a thing of looſe, bare talking, but he hath proved a Deliberate and Formed Conſpiracy, he hath proved, that it was actually Agreed upon, a firſt and at a ſecond time, and that *Charnock* was ſent in Order to the Execution of it. And what was it for? It was plainly to Depoſe the King; he tells you, for that purpoſe they had deſired 8000 Foot, 1000 Horſe, and 1000 Dragoons from the *French* King, and theſe Gentlemen Agreed to Joyn them. Now, can there be a greater Evidence of Depoſing the King, and conſequently of Imagining his Death? 'Tis an Evidence of the Imagination of the Death of the King, as well as of the Rebellion, it being ſo in the neceſſary Conſequence of it. Now, I think, he hath fully proved that. Then we offer to you, how far you will allow of this Examination: Why? Becauſe upon a ſecond Contrivance, here is a Witneſs withdrawn, and can any expect greater Evidence of that, than we have given? We have proved that there was tampering, let the thing run as far as it will. Captain *Porter* was dealt with, had 300 Guineas in Hand, and 300 more he was to have remitted to him; and was to have 300 *l.* a Year, whereof Sir *John Fenwick* was to pay one, and it does follow after that *Goodman* is withdrawn. We muſt leave it to this Honorable Houſe, what Conſtruction you will make of that, Whether here is not a ſecond Plot?

Now this Matter is brought before this Honorable Houſe. We have gone ſo far in it, as to produce *Goodman*'s Examination that was taken before a Juſtice of Peace: We have ſhewed you the Evidence that he hath given upon a former Tryal; and now he is gone ſure no body but

may

may juſtly infer, 'tis by Sir *John Fenwick*'s Means: So that here they have taken away the Evidence that is neceſſary in the Ordinary Courſe of Proceedings. In ſuch an Extraordinary Caſe, I think it hath been uſual for the Parliament to interpoſe: Therefore what they pretended, under favour, that this ſhould not be Evidence, is all taken off. For now we are in Parliament, you will make uſe of ſuch Informations as can give you any light into the Matter, and may Obviate and Cure the Diſtemper that is upon us; and you are Judges of your own Methods, and how far Sir *John Fenwick* hath been Concerned upon the Inſtances we have given you, that is in your Judgments. As for what Sir *Tho. Powys* tells you, That this Power hath not been Exerted by Parliaments very frequently, but it hath generally been done where Perſons are withdrawn from Juſtice, and can't be come at in the Ordinary Courſe. Why, we are in the like Caſe, if ſo be we can't come at Juſtice in the Ordinary Courſe, and that happens by our Evidence having been tampered with, and drawn away, and then, Sir, under favour by their own Arguments, 'tis proper to come before this Honorable Houſe.

And as for what they ſaid, That we have not given any Account that Sir *John Fenwick*, by giving Aſſurance of his Confeſſion, had protracted his Tryal, I did apply my ſelf, That Mr. *Vernon* might give you an Account of it. So that upon the whole Matter, we muſt leave it to your Conſideration, and hope we have given you good Satisfaction, that there hath been a great Plot againſt the Government, and of this Gentleman's being concerned in it, and there was no Evidence of any other Matter before the Judges, and they allowed it to be High Treaſon. Here is the ſame Evidence, only we have not one of them *Viva Voce*.

Mr.

Mr. *Serg. Lovel.* Mr. *Speaker*, I ſhall not trouble you nor the Houſe very long; but I humbly hope, to ſatisfy the Houſe, that moſt that hath been ſaid on the other ſide, is not much to the purpoſe. Sir, I will conſider, with the leave of this Houſe, what the Common Law was before 25 *Ed.* 3. and how the Law does now ſtand; and draw ſome Conſequences from thence, and the neceſſity of this Caſe.

The Statute of 25 *Ed.* 3. I muſt obſerve, it is not an Enacting Law, it is only a Law Declaratory, for all thoſe particular Inſtances of Treaſons that are mentioned there, were Treaſons before that Law was made, and ſo by the Preamble of it, plainly appears: But the Judges had a greater Liberty upon Conſtructive Treaſons, and upon Accumulative Treaſons, and that was left too much at the Diſcretion and Liberty of the Judges below, and the Executive Power of the Law. Then that Statute comes and reſtrains the Judges in that Point, and ſays, that they ſhall not give Judgment in any Caſes of Treaſon, but only in thoſe Caſes particularly mentioned there: And that Statute ſays, That if any other Matter which ſhall be thought Treaſon, ſhould come before them, they ſhall not proceed to Judgment, but acquaint the King in Parliament with it. I only make uſe of it, to prove how Treaſon ſtood before that Act, and how it comes to be altered from the Common Law: And I am ſure it is not to be denyed, but that one Witneſs was ſufficient at the Common Law. But then comes 1 *Ed.* 6. *C.* 12. and that for the Security of the Subject, does Ordain, That in Caſes of High Treaſon there ſhall be two Witneſſes of the Fact: But that Statute does not alter the Treaſon, but was made for the more ſecurity of the Subject in point of Proof. But in that Statute of 1

Ed.

Ed. 6. *C.* 12. That does provide there ſhall be two Witneſſes in Caſes of High Treaſon. There is an Exception of Treaſon for Counterfeiting and Forging of the Coin; and that is the Reaſon that the Law is taken now, that though there muſt be two Witneſſes in the Caſes of other Treaſons, yet in the Caſe of Coining, there needs but one. The Offence or Crime is never the Greater, becauſe there are two Witneſſes to prove it. In this Caſe that is here before you, We come to deſire your help, becauſe one of the Witneſſes is by Art and fraudulent Means withdrawn. Does that purge the Crime at all, or leſſen it? No Man will ſay the Crime is leſs, but it does prevent a regular Tryal before the Courts below; and that is the Reaſon why we did come here, and we hope this Defect ſhall be ſupplied by a ſpecial Law. But, ſay they, 'tis very hard a Law ſhould be made *ex poſt Facto*, to take away a Man's Life. It would be very hard, if the Caſe was as they have cited it, to make a Crime *ex poſt Facto*, that was not ſo before: But I do not take it to be hard for a Law to be made to Repeal another, to make a Matter Tryable, that was not Tryable before.

Suppoſe a Law ſhould be made, that all Treaſons from and after ſuch a Time, ſuppoſe from a Time before the Fact is here ſuppoſed to be committed, as *May* was Twelve Months, ſhould be Tryable as at the Common Law, no doubt the Parliament may repeal a Law in part, or in all. No Man can ſay, but Sir *John Fenwick* might be Tryed at the Common Law, by one Witneſs, before the Statute of 1 *Ed.* 6. So that I do obſerve and humbly ſubmit it to you, That the Law, by this Act, is not changed as to the Crime. The Crime is as it was before; it is only changed as to the Number of Witneſſes required to prove

prove it. The Inſtances that have been obſerved on the other ſide, with humble Submiſſion, I think do not reach our Caſe. We do not inſiſt that there are two Legal Witneſſes; we do confeſs the Information that hath been read, is not a legal Proof; but this Houſe, in their Legiſlative Capacity, is not to be confined to the Evidence that a Jury muſt have below. This Houſe may take what ways and Methods they pleaſe to ſatisfy themſelves. Say they, Here is the Life of a Gentleman that is concerned, I know all good Men will be tender of the Life of a Man, But here is the Life of the King, and the Safety of the Kingdom, the Peace and Safety of us all, that is concerned in the ſame Caſe, and let them put theſe Things into the Balance, and conſider which ought to Weigh moſt.

You have a Record before you of the Conviction of *Peter Cook*, who was Indicted by the ſame Witneſſes.

A Learned Gentleman that is of Councel for the Priſoner at the Bar, did make the ſame Objections as are made now at the *Old Baily*, (it may be there are ſome other particulars now) and after all the Debates and Argument that could be uſed at that Time, it was unanimouſly Reſolved, That the Crime was High Treaſon, and if it was High Treaſon in *Peter Cook*, 'tis no leſs in Sir *John Fenwick*, who was preſent at the ſame Time, and engaged in the ſame Buſineſs: For what was a Crime in one, was the ſame in both.

I think 'tis too diminutive an Expreſſion, to ſay, This was nothing but a little twittle twattle. They did there meet upon a ſolemn Conſultation, and not only once but they did meet a ſecond Time, and what was it to do? It was to invite a Foreign Power to invade this Land, and to make War with the King and Kingdom, and they

they did promiſe and ſolemnly ingage to aſſiſt them with Armed Forces. It was proved, That they did agree with *Charnock* to go into *France*, and that *Charnock* was not willing to go the firſt Time he was deſired, till he found they were ſtanch and ſteady in their Reſolutions; and upon a ſecond Meeting they were all found ſo, and then he would go: I think that is an Overt-Act of Treaſon, if there be any. And when he came back, he ſaid, He had been in *France*, and brought an Anſwer to the Meſſage he went about. This is all now laid before you. But, ſay they, this is an extraordinary Caſe, I do agree it, but becauſe 'tis an extraordinary Caſe, and for the Safety of the King and Kingdom, it is fit there ſhould be an extraordinary Remedy.

They ask, What Miſchief it would be, if this Gentleman ſhould be left to the ordinary Courſe of Law? It hath been the Wiſdom of all Ages to make a Law, to puniſh ſuch as by their Artifice would evade the Law. Here is this Gentleman, as we ſay, Guilty of High Treaſon, but that we ſubmit to you.

This Gentleman was in the Proſecution of the Law, and might have been Tryed in the regular Way, and had the Witneſſes upon their Oaths; (the Grand Jury have found *Billa Vera* upon their Oaths,) but we muſt appeal to a worthy Member of the Houſe (who becauſe he was a Member we did not call upon) to give you an Account how he did Delay and Protract his Tryal; and now they know he can't be Tryed below, they pretend he is willing to be Tryed. And becauſe he can't be Tryed, they would have it as an Argument that he ſhould not be puniſhed by any other Means.

Sir, if ſo notorious a Crime as this is, ſhould be committed againſt the Body of a Nation, and go unpuni-

unpuniſhed, either in the common Courſe, or by ſome extraordinary Methods, the Nation would be in a doubtful and dangerous Caſe.

When this Houſe hath paſſed their Judgments in this Matter, it will go to another Place, where it will have another Examination, and it will have that regular Conſideration that all other Acts have. We are in an extraordinary Caſe, and do think, That this extraordinary Caſe does deſerve an extraordinary Puniſhment.

Sir *Barth. Shower.* I beg pardon but for one Word: No Man does abhor ſuch Conſults more than my ſelf; but I do not think that ſuch Diſcourſes are an Overt-Act of High Treaſon, as deſerves the Puniſhment of Death.

Sir John Fenwick *and the Counſel withdrew. And being withdrawn.*

Admiral Ruſſel. I think this may be a proper Time to Ask Queſtions. If ſo, I think my ſelf enough concerned to trouble you with one or two. I think in the Paper that hath been read, I am mentioned twice. Theſe are the Queſtions I deſire to have asked, What Proof he hath of this? Whether ever he ſaw, And what Proof he has that I ſent Captain *Lloyd* over? And that I gave him a Liſt of the Ships? And that I ſaid, we could not fit out 30 Ships in *May?* And whether or no, ſince this Revolution, he hath had any Converſation with me?

Meaning *Fenwick's* Informations.

Col. Crawford. What that Honourable Perſon ſays, Calls me up. My Name is mentioned in Sir *John Fenwick's* Paper: I deſire you would ask him, Why he mentioned me in his Parper, as he hath done? And that you would require him to make Proof of what he ſays in Relation to me.

Col. Godfrey. I desire some Questions may be ask'd him in Relation to a noble Lord, my Lord *Marlbrough.* If he be Guilty I would have it known, and I would as willingly have it known if he be Innocent, as I believe it will so appear. I would have him asked, Whether since the beginning of this War, or from the Time of this King's Landing, Sir *John Fenwick* did ever speak to him, in publick or private? Or ever did write to him, or receive any Message by Word of Mouth, or Letter, from my Lord *Marlbrough?* He says, That some service he had promised King *James,* which inclined him to promise that Noble Lord his Pardon: I would know what that Service was? And in Relation to his sending *Loyd* into *France;* Whether he can, by any Body else, make that appear?

Col. Crawford. That Gentleman hath put me in mind of one short Question; I desire it may be asked him Whether ever he conversed or spake with me in his Life?

Mr. *Bridges.* Whether Sir *John Fenwick* hath any Body but himself, to support the Hearsay he hath given an Account of? And I desire a Question may be asked him on behalf of the Duke of *Shrewsbury;* What Proof he has that the Duke of *Shrewsbury* came into the Office of Secretary of State again, by the Operation and Consent of King *J* ——

Mr. *Vernon.* I desire a Question may be asked previous to that, because 'tis so in Time; How he knows that noble Lord was in Treaty with King *J.* before he went out of the Secretary's Office, when he was first there?

Col. Granvil. I desire he may be asked, What Proof he can give, that my Lord of *Bath* was to betray *Plimouth* into the Hands of King *J.* or the King of *France,* and whatever else my Father is accused of in that Paper?

Mr.

Mr. *Harley.* I humbly propoſe it to you for the Method of your Proceedings, ſince you take this Method, Whether it will not ſave you Time for you to look upon that Paper, and ask him as to the ſeveral Parts of it, what Proof he can make of it?

Mr. *How.* I do not oppoſe Sir *John Fenwick*'s being Examined to this Paper, but it might have been more to your Credit, if you had Examined him before your Vote upon it. But here are a great many Gentlemen riſe, to queſtion a Man to that which he does not pretend to any Proof of, nor is any way to the Purpoſe. It may be poſſible Sir *John Fenwick* may never have ſeen any one of the Perſons named in the paper and yet all in his Paper be true. The beſt way for ſaving your Time is, I conceive, to have the ſeveral Parts of the Paper that doe concern theſe Gentlemen read to him, and to ask him upon what Grounds he gave the King each particular Information. This will lead him into all that he knows of the Matter, which is pretended ſo much to be deſired.

A Vote made a little before by which that Paper was condemned.

Mr. *Boſcawen.* I am not againſt the Queſtion that is propoſed laſt; but you may ask him that at laſt. But there is a noble Lord that is reflected on in that Paper, and that is my Lord *Godolphin*, I deſire you would pleaſe to ask the ſame Queſtions as to him.

Lord *Coningsby.* I did intend to take Care of my Lord *Godolphin*, There is a hard Reflection upon that noble Perſon. But, under Favour, you muſt, I think, let Sir *John Fenwick* know you have ſuch a Paper, and then ask him in General, What Proof

he has to the Particulars of that Paper? And then you will do Injuſtice to no Body.

Mr. *Norris.* There have been ſeveral Queſtions moved by ſeveral worthy Members; and, I think, the Queſtions ought to be asked: But, I think, there is one previous Queſtion to all theſe; and that is, when you tell him that you have ſuch a Paper, I think the firſt Queſtion ſhould be, Whether ever he delivered thoſe Papers to the King.

Sir *R. Delaval.* I find I am named in that Paper that Sir *John Fenwick* hath given; I deſire that part that relates to me may be read to him; and that he may give a Reaſon, why he hath ſaid ſo of me, and Mr. *Killigrew.*

Lord *Walden.* There is another mentioned, and that is Commiſſary *Crawford*; I deſire he may be asked, What Proof he hath that he gave Mr. ——— a Liſt of the Army?

Mr. *Chanc. of Exchequer.* I can't blame Gentlemen for asking Queſtions that concerns them, or their Friends: Some are for Reading of it to him, I am againſt that: But yet I would have you to enquire into this Paper. And being you intend to do it, it might have been as well enquired into before Mr. *Dighton* came laſt to him. I think you may put your ſelf into an eaſy Method, and avoid all leading Queſtions, by asking him upon every Name in that Paper as you come to it, What he knows of that Gentleman? And ask him no other Queſtion.

Mr. *Smith.* I was ſtanding up to the ſame purpoſe; I would not have you to put Words into his Mouth, nor let him know by any Queſtion what Anſwer he is to make.

Mr.

Mr. *Speaker*. Gentlemen, I am willing to do you any Service I can, but here are long Informations, and I never read them, nor know the Contents of them, but as they were read at the Table.

Mr. *Att. Gen.* I think the Method lately propoſed will ſave you a great deal of Time, and is proper for the Diſcovery of the Truth; That you will Name the Perſons to him in Order as they are in the Paper, and ask him in General, What he knows of thoſe Perſons? But when you call him in, I am not for asking him to the particular Things he hath ſaid againſt them in that Paper; becauſe that Paper, though it is under his own Hand, is not his own; and if he knew it then, he knows it ſtill.

Col. *Mordent*. I won't pretend to propoſe any Thing, only for the ſhortning of your Time: If after you have informed him there is ſuch a Paper, that you ſhould ask him, Whether he would own it? And then, What ſort of Proof he will bring to prove it? You will find he will either tell you, he will Adviſe with Counſel, or whether he will give any Anſwer at all.

Lord *Cutts*. I have only one Queſtion to be asked Sir *John Fenwick*; 'tis not a Queſtion that relates to any Perſon named in that Paper. I think there is no one Perſon that he hath named, but is eminently known or believed to be in the intereſt of this Government; and none but what are in ſome Poſt of Truſt, and Employment in it. Then, I think it highly neceſſary to know, How it comes to paſs that he hath had ſo much Converſation with Perſons of that Character, and none with thoſe People that he hath been ſeen daily to Converſe with? And if

he hath, Why he hath not diſcovered them, as he hath done the reſt?

Mr. *Speaker.* Is it your pleaſure I inform him that we have the Informations?

Mr. *Palmes.* If I am not miſtaken, when you firſt called Sir *John Fenwick* before you, he referred himſelf to what he had informed the King; and referred himſelf to that Paper, as often as you asked him any Queſtions. And if you ask him general Queſtions, I preſume he will give you the ſame Anſwer: Therefore I think, it may be proper to ask him, Whether this is the Paper that he delivered in, or not? Or otherwiſe, I doubt, he will tell you, He knows nothing but what is in that Paper. Now, if he refers to that Paper, you may ask him, If he knows it again, if it be ſhewed to him?

Mr. *Sloane.* What this Gentleman hath ſaid, has partly interrupted what I was going to offer. But as to what he ſays, That when he was here before, he referred to his Confeſſion delivered in to the King; we did not tell him we knew of that: But he put it further, That he was not bound to Accuſe himſelf, and that what he ſaid might be given in Evidence againſt him; and ſo far he was in the Right. For if he knew of any Body that was concerned in a Conſpiracy againſt the Government, that was Miſpriſion of Treaſon at leaſt in him. I don't queſtion but it was a very miſchievous Contrivance; but if he ſhould confeſs it, without ſome Aſſurance of being indemnified, he proves himſelf to be Guilty of it.

Mr. *Vice Chamberlain.* You are now upon the Method of your Proceedings: There is great Suſpicion whether this Paper be Sir *John Fenwick's* own

own or no. If you will tell Sir *John Fenwick*, that in the Paper in your Hand he hath laid Things to the Charge of Perſons of Truſt, whom this Houſe hath a good Opinion of, and that this Houſe deſires to know, What Ground he hath for it? If he does not think fit to give you an Account of it, there is an End of your Enquiry.

Mr. *James Mountague*. The Houſe ſeems to Agree, that they will have Sir *John Fenwick* ſent for in: I ſuppoſe you will nor have his Counſel, nor Solicitor by; and when he withdraws, I deſire he may be kept private from his Counſel and Solicitor.

Ld. *Cutts*. By Sir *John Fenwick*'s Behaviour, when he firſt appeared at the Bar, and by what he ſaid then, I believe Sir *John Fenwick* did tell you to this Senſe, That he had Aſſurance from a noble Perſon, that what he then ſaid ſhould not riſe againſt him in Judgment; and I think he was told, If he dealt ingenuouſly, he might expect Favour, or to that Effect. I do for the ſaving of your Time, mention it to you, to conſider how far the Houſe may give him Security, that what he here ſays ſhall not riſe up in Judgment againſt him, and that if he dealt Ingenuouſly, he may expect ſome Favour from this Houſe.

Mr. *Harley*. You are upon the niceſt Thing in its Nature that poſſibly can come before you. I think before you call him in, it ought to be underſtood that the Queſtions be very plain.

Mr. *Manley*. I think you have been well moved from the other ſide, That we ſhould not read this Paper to Sir *John Fenwick*: And I am

of that Opinion from this Conſideration, beſides what hath been mentioned. We are here in a Judicial Capacity as well as a Legiſlative; and this Paper I take to be an Examination made upon Sir *John Fenwick*; and as my Memory ſerves me, ſome Things he ſpeaks of as Matters of Fact, which he does poſitively aſſert; which being contained in the ſame Paper with other Matters of Hearſay, if you ſhould Read that Paper to him, and ask him a Queſtion, Whether that be his Paper? That I doubt will be contrary to the Rules of Law: For it will be asking, Whether this Information againſt himſelf be true or falſe? And I think it does not become the Dignity and Honour of this great Aſſembly, to ask him any Queſtions that may make him Accuſe himſelf.

Mr. *Vernon.* I would obſerve to you, that Gent. has not conſidered theſe two Papers: The firſt of theſe Papers I think the Bill refers to, and that is under Sir *John Fenwick*'s Hand and there he does Charge nothing at all upon himſelf, but it is an Accuſation upon the Perſons named. In the firſt Paper he does ſay, There was a ſelect Number to manage the Affairs of King *James*, but they are not named. Afterwards he went about to explain it in the ſecond; but the Bill referring only to the firſt, I ſuppoſe you will confine your ſelves only to the firſt Paper.

Mr. *Chanc. of Exchequer.* I would Think of ſome way to reconcile theſe Things you are going upon: For though Gentlemen are in the right to preſs for theſe Queſtions; yet I do not think it the Buſineſs before you. Therefore I think you ſhould acquaint Sir *John Fenwick* that this

this Paper hath been preſented to you, which this Houſe hath thought falſe and Scandalous: But before he goes away, this Houſe has a mind to hear what he would ſay to it; and let him ſay what he will upon that, then you will not lead him by any Queſtion. The firſt Perſon that is named I have a great Reſpect for, and am as willing he ſhould be vindicated as any. The firſt Queſtion you are to ask him is, What he knows of my Lord *Godolphin*? But that you ſhould literally ask him Queſtions, as the Paper ſtates it, I don't think it proper for this Aſſembly: For there are Facts beyond the Act of Indemnity many of them. After you have done with the Paper, I have ſome Queſtions to ask him. I take theſe Matters to be falſe; but I ſhall have ſome Queſtions to ask him to what I believe will prove true.

Mr. *Bridges.* Before you call in Sir *John Fenwick*, I would offer one Thing to your Conſideration; I think that Paper you are upon is written with Sir *John Fenwick*'s own Hand. Why may it not be fit for you to ask Sir *John Fenwick* if that be his Hand?

Members. No, no.

Mr. *Speaker.* Is it your Pleaſure that Sir *John Fenwick* be called in?

Which Queſtion being put it paſſed in the Affirmative. And he was brought in without his Counſel.

Mr. *Speaker.* Sir *John Fenwick*, this Houſe does underſtand that you have given in Informations againſt ſeveral Perſons of great Quality, that have been in the Government, and they do expect

pect from you, that you ſhould deal Clearly and Candidly with them, and give them an Account of what you know in relation to thoſe Perſons. I am commanded in the firſt Place to ask you, What you know of my Lord *Godolphin* in relation to this Matter?

Sir *John Fenwick.* I am under a double Proſecution, Sir, for my Life. I know not but what I ſay may turn to my own Prejudice. I hope the Houſe will not think it Obſtinacy in me; and ſince this Houſe have done me the Favour to hear me by my Counſel, I hope they will pleaſe to conſider what they have ſaid.

Mr. *Speaker.* No doubt the Houſe will conſider what you have ſaid by your Counſel, that is, in reference to your own Defence; but they do expect from you as I told you before, That you do deal Candidly with them in what you know of this Matter.

Sir *John Fenwick.* Sir, I am under Proſecution for my Life; and, I hope, the Houſe will pleaſe to conſider, That I know not what inconvenience may come upon me by it; and, I hope, the Houſe will Excuſe me, for I do it not out of Obſtinacy, but for my own Preſervation.

Mr. *Speaker.* You would do well to Adviſe your ſelf well in this Matter, 'tis of great Concernment; the Favour of this Houſe, if you deſerve it, may be of great Kindneſs to you. I have only in command to tell you, what the Houſe expect, and you are to conſider how to Anſwer it.

Sir

Sir *John Fenwick.* I hope the Houſe will not put me upon any Thing that may hurt my ſelf. I ſhould be ſorry to incur the Diſpleaſure of this Houſe, but I hope they will conſider my Condition; and I am ſure the Juſtice and Honour of the Houſe is ſuch, That they will not preſs any Man to do any Thing that may hurt himſelf.

Mr. *Speaker.* Sir, if you pleaſe to withdraw.

Accordingly Sir John Fenwick *withdrew.*

Ld. *Cutts.* I would humbly propoſe ſomething to you to ſave your Time, and remove this Inconvenience. The Houſe have heard what Sir *John Fenwick* ſays. I can't but ſay, that in Matters of Blood we can't be too tender; but that I would propoſe to you if the Houſe approve of it, is this; Suppoſe you wave this Matter to the laſt Moment of paſſing your Bill, and then I ſhall have ſomething more to ſay to you in it.

Mr. *Clarke.* Now I think it very proper for you to proceed in your Legiſlative Capacity. I am glad the Houſe have taken ſo much Pains in the Examination of the Matter; and it is no ſmall Satisfaction to me, That the Gentleman was brought to the Bar upon this Enquiry. Very probable another Time may induce him more to Comply than he does at preſent, though, if I may ſpeak my Opinion, there is little hope of the Gentleman's Anſwering your Expectation here: And I think the firſt thing you are to do now, is to read your Bill.

Mr. *Pultney.* One of the Allegations of the Bill is, That his Tryal was put off upon ſeveral repeated

repeated Pretences of making a Confeſſion. The Counſel for the Priſoner took Notice, That that Allegation was not proved: The Counſel for the Bill told you, They muſt refer to a worthy Member of this Houſe, who could prove it; the worthy Member is Mr. *Vernon.* I ſuppoſe before you enter into a Debate (as there will be after the ſecond Reading of the Bill) Gentlemen will deſire to have all the Evidence. And I find your Order is, That Mr. *Vernon* do give in his Evidence while Sir *John Fenwick* is at the Bar; and therefore I humbly move, That Sir *John Fenwick* may be called in while Mr. *Vernon* gives his Evidence.

Mr. *Speaker.* I ſuppoſe, if Mr. *Vernon* gives Evidence, you will call in the Counſel.

Members. Yes, yes.

Mr. *Speaker.* Pray then hear the Motion that hath been made. Shall I put the Queſtion, That Sir *John Fenwick* and the Counſel be called in, while Mr. *Vernon* does give his Evidence?

Which Queſtion paſſed in the Affirmative, and Sir John Fenwick, *and the Counſel on both Sides, were brought in.*

Mr. *Speaker.* Gentlemen, you that are of Counſel of both Sides, the Houſe, before they proceed any further, was willing to hear the Teſtimony of a worthy Member of this Houſe which has not yet been given; and they are willing that Sir *John Fenwick,* and you, ſhould be preſent while it is given. Mr. *Vernon,* will you pleaſe to acquaint the Houſe, *&c.*

Mr.

Mr. *Vernon.* If I underſtood the Councel for the Bill aright, that which they did Appeal to me for, was about the Protracting of Sir *John Fenwick*'s Tryal, and upon what pretence it was. The Account, Sir, that I can give of it, is this. That Sir *John Fenwick's* Tryal was put off, will appear beſt from the frequent Adjournments of the Seſſions at the *Old Bayley* for ſix or ſeven Weeks together. For when Sir *John Fenwick* was Committed to the *Tower* (which was as I take it) on the 15th of *June*, there was, I believe, a Seſſions to be held ſoon after; for as I remember it, the firſt Application that my Lady *Mary Fenwick* made for putting off Sir *John Fenwick*'s Tryal, was upon the 30th of *June*, and the Petition was, That he might have ſome Friends come to him to adviſe him how to make his Application to the King: On the 30th of *June*, or about that time, my Lady *Mary Fenwick* did firſt Propoſe, That ſome body ſhould be ſent over from Sir *John Fenwick* to the King upon ſome Matters of Importance, but did not declare what they were, but only that ſhe was told there were ſuch Matters, and ſhe had a proper Perſon to ſend, and would acquaint the Lords Juſtices with the Man, if he might have leave to go: But afterwards my Lady *Mary Fenwick* ſaid ſhe could not provide a Perſon ſo ſoon. And, I think, the 2d *July*, ſhe came and offered to go her ſelf, and ſaid, if it was not as much for the King's Service, as Sir *John Fenwick*'s Benefit, ſhe would not undertake the Journey. She had leave to go, and would have Capitulated, that the Tryal ſhould be put off till ſhe returned; but the Lords ſaid, when ſhe would return, would depend upon her pleaſure; but they would write to the King at the ſame time, and give notice of her Intention, and that the Tryal ſhould not

go

go on till they had an Anſwer to their own Letter.

There was a Paſſage ordered her in the Royal Tranſport Ship then going to *Holland*, and my Lady *Mary Fenwick* deſired to ſpeak with Sir *John* in Private, in Order to her Journey. The ſame Night ſhe came back again, and ſaid, ſhe had conſidered of it, and would not go, and ſeveral Reaſons ſhe gave for it. Upon the 7th of *July* there was a Noble Lord that was in the Commiſſion for the Adminiſtration of the Government, ſaid, he had an Application made to him from another Noble Peer, my Lord *Carliſle*, who deſired that he would go to Sir *John Fenwick*, for he had been very earneſt to ſpeak with him. That Noble Lord did acquaint the reſt of the Lords Juſtices with it, who acquieſced in what he thought fit to do in the Matter.

He went the ſame Day to Sir *John Fenwick*, and the next Day the Lords Juſtices meeting again, he told them he had been with Sir *John Fenwick*, and what Sir *John Fenwick* had told him, he had ſent to the King, for he did not allow it ſhould be otherwiſe Communicated. My Lords then thought it was very fit to ſtay for the King's Anſwer. This was the 7th of *July*, and by what accident, I know not, no manner of Account came till the 7th of *Auguſt*, that the Letter was received, but the 7th of *Auguſt*, the Letter was acknowledged to be received, and the Anſwer that then came to it, was That the King had not received any great ſatisfaction by the Meſſage (I know not what it was) but that Sir *John Fenwick* ſhould be Tryed; but withal, that Noble Lord acquainted my Lords Juſtices, That the King was pleaſed

to Write to him, That what Sir *John Fenwick* had to ſay, ſhould be ſent to him in Writing. It happened at that time, that the Judges were upon their Circuits, and there being the King's Directions to receive what Sir *John Fenwick* had to ſay, in Writing, That Noble Lord did undertake to go again to Sir *John Fenwick*; and, I ſuppoſe, he did receive ſomething from Sir *John Fenwick*, which he ſent to the King. When the Anſwer to that came, it was *September*, and that Noble Lord was at the *Bath*; and ſo it required a little time to hear from him. Then it appeared, That the King's Direction was, That what Sir *John Fenwick* had ſent to the King, he ſhould prove it, and he ſhould likewiſe ſhew his Ingenuity in Confeſſing what he knew of any other Deſigns againſt the Government. On the 10th of *September*, as I take it, I was directed to go to Sir *John Fenwick*, who was then in the *Tower*, and to acquaint him with this Meſſage from the Lords Juſtices. Sir *John Fenwick*'s Anſwer was, That he had no more to ſay, or Words to that effect, and he muſt prepare for his Defence as well as he could; but if he could ſpeak with that Noble Lord, he ſhould be glad to do it, but he was not come from the *Bath*, and Direction was then giving for his Tryal again. In the mean time, that Noble Lord came to Town, and he went to Sir *John Fenwick*, and brought an Account from him, That Sir *John Fenwick* would prove to the King, and make out what he had ſaid; and was ready to give the Lords Juſtices Satisfaction. Upon that, I was ſent to Sir *John Fenwick*, and I carry'd the Meſſage in Writing, which you may ſee when you pleaſe; and it was to ask him, Whether he was willing to make out by Proof,

what

what he had already ſaid to the King, and whether he was ready in Compliance with the King's Directions, to give the Lords an Account of what he knew of any Deſign againſt the Government? I carry'd Sir *John Fenwick* this Meſſage, and he returned an Anſwer in Writing, That he was ready to make out to the King, what he ſaid, and would acquaint the Lords with all the Matter that he had not obſerved to the King. His Arraignment was then to have come on the 17th but he did Dictate a Paper which was brought to the Lords, which they thought fit to be ſent to the King, and the Tryal was put off as to that time, And before an Anſwer from the King, came, it was (I believe) the beginning of *October*: And this is the Account I have to give you.

Mr. *Speaker*. Gentlemen, you Conſider that this Evidence is given, with Relation to that part of the Bill, that ſets forth, how Sir *John Fenwick* had delay'd his Tryal by Offers of Confeſſion. You have heard what the Evidence is; if you have any thing to obſerve as to that point, you may ſpeak before you withdraw.

Sir *Tho. Powys*. As to this Matter, I can only ſay, That in it ſelf at leaſt, according to our Rules of Law, it is not, in any degree, Treaſon: What you will Conſtrue it to be, I can't tell. We think it is only what is very uſual when Perſons are under an Accuſation; they will put off their Tryal as long as they can: Perhaps their Witneſſes may be out of the way, or ſomething elſe may be the Reaſon of it, and it does not carry any Crime in it ſelf; or at leaſt, not of the Nature that this Bill is of.

Sir *Barth.*

Sir Barth. Shower. We do think, with Submiſſion, That conſidering the Nature of the Bill, and the particular Caſe of Sir *John Fenwick*, it will (in ſome meaſure) anſwer this Fact: I take this ſingly in it ſelf, as it hath been obſerved, not to conſiſt with Honour; but it does not import a Crime for any Man to uſe little Inſinuations to put off his Tryal: But, ſuppoſe it was unlawful, or that which they call Prevaricating: I hope it is far from making him Guilty of High Treaſon, which is the greateſt Crime this Bill deſigns to paſs Sentence for; and, I hope, you will Conſider, if it be an Offence, 'tis ſo at the Common Law; and the ſame Evidence will prevail to bring Sir *John Fenwick* to Condign Puniſhment by the Common Methods. And if it be no Offence, I hope you will not by a Law make it an Offence, ſo as to inflict the greateſt Puniſhment for this Artifice.

Mr. Speaker. Mr. Sergeant *Gould*, Have you any thing to ſay?

Mr. Serg. Gould. No, *Mr. Speaker.*

Mr. Speaker. Then withdraw.

And being withdrawn.

Mr. Sloane. I Propoſe it to you, Whether, if the Paper be Evidence, it ſhould not be read in the Preſence of the Priſoner?

Members. No, No.

Then the Queſtion was put for Candles, which paſſed in the Affirmative, and they were brought in.

Ordered, That the Counſel be diſcharged any further Attendance at this time.

Mr. Methwin. There can be no Debate previous to the Reading of your Bill. I deſire the Order of the Day may be Read.

Accordingly, the Order of the Day for Reading of the Bill a Second Time, was Read by the Clerk.

Then the Bill was Read a Second Time by the Clerk.

And being afterwards opened by *Mr. Speaker*, and *Mr. Speaker* having expected for ſome time, and no Member riſing up to ſpeak.

Mr. Speaker. Shall I put you the Queſtion of Commitment?

Sir Tho. Dyke. Sir, I hope you will not put the Queſtion of Commitment till ſome Exception is made to the Bill. I am ſure it is as liable to Exceptions as any Bill that hath been brought in a great while. 'Tis a tender Subject to ſpeak of, the Pretence of the Bill being for the Preſervation of the King and Government; and if I thought it was really ſo, I ſhould be heartily for it; for I think there is no Compariſon between the value of the King's Life, and that of a Private Perſon's, but that hath been often ſaid, but not proved; therefore, I think, I may tell you my Reaſons why I am againſt the Bill. That the Parliament hath a Power to make ſuch a Law, is agreed; but I think it ought not to be uſed but upon Extraordinary Occaſions, when Great Perſons are concerned, that can't be otherwiſe brought to Juſtice, and when Crimes do not fall under the Denomination of the Law, which is not the preſent Caſe. This Caſe is, That a Gentleman is charged with Treaſon, and 'tis proved but by one Witneſs, though the Counſel did ſay, That a Conſult to Levy War was not Treaſon. Now, either it will not be the Crime that is alledged, or it is not proved. Here you are Judges, Proſecutors, Witneſſes, and Jury: I would know in what Country it is ſo beſides? The Witneſſes are produced here, and not Sworn; and upon the whole, there is but one Witneſs. Sir, I am againſt the Bill, and againſt it, as being of dangerous Conſequence.

Mr. Pultney. This Matter before you is of ſuch a Nature, that I hope all Gentlemen will hear one another with the greateſt Attention that may be.

The Worthy Member admits you have a Power to Paſs the Bill, and I do not find that conteſted by any Body; though (with Submiſſion) the latter part of what he ſaid, contradicted what he admitted at firſt; but ſince that is ſo much Agreed, I ſhall ſay but little to it, and that is this, That without ſuch a Power

Power as this, any Government would be imperfect, and would want a ſufficient Power for its own Preſervation, upon Extraordinary Occaſions. You have been told, this hath been an untrodden Path; but I believe, Gentlemen are pretty well ſatisfied it hath not been ſo untrodden, and many Precedents of that kind have been quoted; and the Counſel for the Priſoner have admitted, That there have been frequent Precedents. An Objection hath been made to ſome of them, That they were made in ill Reigns; but I take it be no Objection, That the Precedent was made at one time or another, ſince 'tis agreed, that we have ſuch a Power, and that that Power hath been exerted.

The chief Matter before you is, Whether in the preſent Caſe, there is ſufficient ground for you to Exert that Power? And upon that, give me leave to obſerve the Nature of the Crime of this Gentleman, and the Evidence that hath been brought to prove him Guilty of that Crime. His Crime is High Treaſon, the higheſt Crime in the Law: 'Tis for Conſpiring the Deſtruction of the King, and the Overthrowing of the Government. The Overt-Act, which the Bill tells you (and is mentioned in the Indictment) is his Inviting in a *French* Force, in order to accompliſh this Deſign. If this Crime would admit of Aggravation, ſome other parts of the Bill would aggravate it; but I think it will admit of none. The Counſel at the Bar made a doubt, Whether or no, that which was laid in the Indictment, did amount to a ſufficient Overt-Act of High Treaſon? And his Argument he drew from a Book that hath been put out by a Learned Gentleman of the Houſe; but the Gentleman could eaſily have anſwered himſelf; and, I preſume, did not ſpeak his own Opinion. For that very Gentleman writ a Book, called, *His Majeſty and Government Vindicated*; by which he endeavoured to overthrow the Arguments in the other Book of the other Gentleman:

As to the Proof before you, you have had the Teſtimony of Mr. *Porter*, whoſe Evidence hath been juſtified by the ſeveral Convictions grounded upon it; and by the Confeſſion of ſeveral Gentlemen, that have owned the Fact at the very time when they were going out of the World: And there hath been no Evidence brought by the Priſoner at the Bar, that could invalidate the Teſtimony of this Gentleman. And ſo (with Submiſſion) you have one undoubted Evidence, that does Charge the Priſoner with the Fact mentioned in the Bill: You have other Proof that does not come up within the Letter of the Law; but you have ſtrong Circumſtantial Proof, that every Gentleman will apply to his Conſcience in the Judgment he ſhall give in this Matter. One of the Allegations in the Bill is, That he did by repeated Promiſes of making a Confeſſion, from time to time, gain a delay of his Tryal. It is a great Preſumption, That that was in order to a Deſign that he had of Seducing Mr. *Goodman*, who was one of the Witneſſes; for it was obſerved to you, what Practice there was in the Caſe, with the other Evidence, Mr. *Porter*.

Sir, Gentlemen have objected the Conſequences of making a Precedent: You were very well told by a Worthy Gentleman, that ſpoke the other Day, near the place where I am, That in the Caſe of a Good Parliament, 'tis not to be imagined that they will make uſe of this Precedent, but upon as good a ground as you have now; and an Ill Parliament, they will have the ſame Reaſon, for they will Copy after the ſame Precedents that have been made before, and will not ſtick at doing of it.

Beſides, let Gentlemen conſider this way of Arguing; I have a Power to do ſuch a thing, and yet if I have ſuch a ground as is ſufficient, I ſhall not make uſe of it: To ſay you have a Power, but ſhall not Exert it, is as good as to ſay, you have no Power at all.

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There were ſome Precedents cited by a Learned Gentleman that ſpoke againſt the Bill, and he particularly quoted that of my Lord *Strafford*; and the Act of Parliament that Repeals that Attainder, was in part Read to you: But, Sir, the Reaſons given in that Bill of Repeal of my Lord *Strafford*'s Attainder, are, That it was obtained in a Tumultuous Manner, which influenced the Parliament in doing of it; and that it Paſſed in the Houſe of Lords, when moſt of the Lords were abſent: And at laſt, the King, when he gave his Conſent, by Commiſſion, to the Paſſing of the Bill, it was with great Reluctancy. 'Tis certain, all theſe are Reaſons that are given; but there is not one that queſtions the Parliament's Power of doing it; though upon the Tryal, Gentlemen may remember, there was a doubt in the Law, Whether the Evidence was ſufficient.

Sir, It hath been urged to you, of what ill Conſequence it would be, and how much Injuſtice to make a Law to Puniſh a Man, *Ex poſt Facto*; but that the Parliament may Declare that to be a Crime, which was not ſo before, no body doubts; and without that, the Clauſe in 25 *Ed.* 3 ſignifies nothing; and I don't imagine it is a greater Injuſtice to ſupply a point of Form, as to Matter of Evidence, when the Fact committed by the Priſoner, was againſt a known Law, at the time when it was committed: And the rather, if I think that defect of Form in the Courts below, was occaſioned by the Priſoner. 'Tis a Matter of Blood, 'tis true, but I do not aim at this Gentleman's Life in it; but any Man muſt believe he muſt be concerned in great Matters, to bring to paſs this great Deſign; therefore all I Propoſe by it, is to get his Confeſſion, which in all probability we might have had, if the other Witneſs had remained here.

Sir, upon the whole Matter, I do think we have Power to do this: I do think here is good Evidence (I ſpeak with reſpect to my ſelf) to think him Guilty

of this Crime. I do think, if this Bill does miſcarry, there is the greateſt blow that can be given to your Conſtitution. And give me leave to uſe this Expreſſion, I think, if this Bill miſcarry, it not only turns this Plot upon you, but makes it impoſſible ever to come to the Depth of any other. And for theſe Reaſons, I am for Committing of this Bill.

Mr. Newport. Sir, I am unwilling to trouble you at any time, but more-eſpecially in this Debate, when I am afraid I am like to ſpeak againſt the Opinion of the Majority of the Houſe. For I ſee Gentlemen begin already to be in haſt for the Commitment of the Bill; but it was the Saying of a Learned Man, *De morte hominis non eſt cunctatio longa*, We cannot too well conſider where the Life of a Man lies at ſtake.

Sir, In this Matter I look upon my ſelf (as every Gentleman here is) to be a Judge; and therefore I will in this Caſe, as in all others, go according to the Dictates of my own Conſcience. I muſt be ſaved by my own Faith, and never will pin my Faith upon another Man's Sleeve: Perhaps it may be a Weakneſs in my Nature, that I am very tender in Matters of Blood, Blood once ſpilt, is never to be gathered up again. And therefore I hope Gentlemen will have ſo much Patience one with another, as to ſuffer a Bill of this Conſequence to be debated fully, before we come to any Reſolution. A Gentleman below ſaid the other day, it was poſſible, in his own private Opinion, he might believe the Priſoner Guilty; and ſome notice was taken of thoſe words. But, Sir, I would put a Caſe for Argument-ſake, and would have it taken no otherwiſe, and I would go a little further than that Honourable Gentleman: And ſuppoſe I knew of my own Private Knowledge, that Sir *John Fenwick* was Guilty; yet, Sir, with Submiſſion, as a Judge, I do not think it ought to weigh one way or another with me, and I will give you my Reaſon for it. For, as a Judge, I am to go according to my Judicial Knowledge, and not according to my Pri-

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vate Knowledge. 'Tis a Maxim in Law, *Nil refert quid notum ſit Judici, ſi non notum ſit in forma Judicii.* And it puts me in mind of a Caſe in the Book *H.* 4. where a Man killed another, in the Preſence of a Judge, Travelling on the way, when the Murder was. And at the next Aſſizes in that very County before the ſame Judge, another Man was Indicted of that very Murder, and Arraigned and Convicted by Verdict. In that Caſe (ſays the Book) the Judge ought not to carry himſelf according to his Private Knowledge which he had of the Fact, and ſo to acquit the Priſoner; But all that he in that Caſe could do, was to reſpite Judgment againſt the Party, becauſe of the Judge's knowing to the contrary, and to make further Relation thereof to the King for his Pardon of Grace for the Party.

The Evidence that is produced, is a Living Witneſs: The next Evidence was the Confeſſion of *Goodman*, taken before a Juſtice of Peace. Now as to that, truly I did not think yeſterday it was a Legal Evidence, I am ſure in a Court of Law it would not be admitted, but the Houſe was pleaſed to read it; and Gentlemen when they preſs'd to read it, told us, *Valeat quantum valere poteſt*, not as a Concluſive Evidence. Why then, if you ſtrike this Paper out of the Caſe, with Submiſſion, there is nothing left but the Teſtimony of Capt. *Porter*, and then in this Caſe you have but one Witneſs.

Sir, Give me leave to ſay, it will ſeem a little ſtrange, That the Commons of *England*, that lately were ſo very careful of the Lives of the Subjects, and were ſo deſirous of Paſſing a Bill that did provide, That where there were two Species of Treaſon in one Indictment, and one Witneſs to one Species, and another Witneſs to another Species, that that ſhould not be good Evidence to Convict a Perſon of High Treaſon: That now we ſhould be for Attainting a Man for High Treaſon upon one ſingle Evidence: Surely they will ſay, we have mightily changed our

Opinions ſince laſt Seſſions of Parliament. I ſpeak not this upon the Account of Sir *John Fenwick*, I know him not, he is a ſtranger to me, though I am not to his Character, and that I hear is none of the beſt. I ſpeak it as it may be my Caſe, or any man's Caſe here: God knows we live in unſettled Times, and no Man can tell how ſoon a Precedent of this Nature may turn upon any Man whatſoever. Some of us may live to ſee a bad Reign, and then when a Man cannot be Attainted by the ſettled Rules of *Weſtminſter-Hall*, the Legiſlative Power muſt be called in for Aſſiſtance, and then I am ſure no Man is ſafe.

Amongſt the many Irregularities committed in the late Reigns, I thought that of Mr. *Algernoon Sidney* one of the greateſt Strains I ſaw in *Weſtminſter-Hall*; for there my Lord *Howard* was one Witneſs againſt him, and the ſecond Evidence was a Book he had wrote many Years before againſt Sir *Robert Filmore*, (which I think is printed ſince this Revolution, and I have it in my Study, and I hope I ſhall not be hanged for it.) I ſay, this Book, though wrote ſo many Years before, was conſtrued to be calculated for a Treaſon that had not been committed above two Months, and was the ſecond Witneſs to Convict him. But that Attainder was reverſed, and it was fit it ſhould be ſo; for I thought it a hard ſtrain to Convict a Man upon that Evidence.

Sir, I am very ſorry this Bill is brought into the Houſe: Nor can I imagine, after all that hath been ſaid by the Learned Gentleman my Neighbour here, why this Man was not tryed when there was two poſitive Witneſſes againſt him. All the Reaſon this Gentleman has told you, is, that he promiſed to make an ingenuous Confeſſion. But any Man might have ſeen through this Confeſſion, that it was only an Artifice to abuſe the King's beſt Friends; nay, the rather, when this Gentleman's Brother-in-law had ſerved this very Government but two or three Years ago the ſame trick. We know my Lord *Preſton* was attainted

of

of High Treaſon, and then he muſt do ſomething for to merit his Pardon; and he made an ingenuous Confeſſion, as he call'd it, wherein he accuſed moſt of the Great Men; and when he had a Pardon, though his Confeſſion was under his own Hand, and delivered to the King, he denyed every word of it, and what he had told, was only, he ſaid, to ſave his own Life. My Neighbour here cited you ſeveral Precedents, I have read many of them, they are moſt of them mentioned in *Ruſhworth*'s Collections, in the ſeveral Arguments that are there for the Paſſing the Bill of Attainder againſt my Lord *Strafford*: And all that I can ſay to them, is, I could not have come up to them, had I lived in thoſe Times. The Caſe of Sir *John Mortimer*, who being committed to Priſon upon ſuſpicion of Treaſon, brake Priſon, and made his Eſcape; and for this, and no other cauſe, in the Parliament in the ſecond Year of *H.* 6. he was Attainted of High Treaſon by Bill in Parliament. So in 3 of *R.* 2. the Caſe of one *Kirby*, who, without any Malice, and, as the Record ſays, *ſe defendendo*, killed the Embaſſador from *Genoa*; the Parliament declared it Treaſon. And the laſt Caſe he cited was the Caſe of a Cook, that put Poiſon into a Pot of Pottage, in the Kitchen of the Biſhop of *Rocheſter*, whereof two Perſons died. And what did they do? Why, he was attainted of Treaſon, and it was Enacted, that he ſhould be boyled to Death, by the Statute 22 *H.* 8. *cap.* 9. I have a great Honour for the preſent Biſhop, but if it had happened in his Family, I ſhould have hardly conſented to the like Judgment, *Judicandum eſt Legibus non exemplis.* There's no Man doubts your Power, but the Queſtion is, Whether you will exert this Power upon all occaſions. And in moſt of the Bills of Attainder that I can find, when Men have come to conſider upon ſecond Thoughts, moſt of thoſe Attainders have been Reverſed, and a mark of Ignominy and Reproach ſet upon them. *Roger Mortimer* was Attainted in the

firſt

firſt Year of *Edw.* 3. but we find in the 28 *Edw.* 3. that Attainder was Reverſed. And why? Becauſe he was not brought to Anſwer, as he ought to have been. So likewiſe the Attainder of the Earl of *Arundel*, in the 28 *Edw.* 3. Not to mention one of a later date, that of the Earl of *Strafford*, and many more might be cited, but I am loth to tire you; I ſhould be glad this Gentleman might ſuffer his due Puniſhment, but I am not by any means ſatisfied in the paſſing of this Bill. And as to his not being Tryed, if the Government have ſlipt their Opportunity, or made any Miſtake, I'll not ſodder up their Neglect or Defect, or whatſoever you will pleaſe to call it, by paſſing this Bill of Attainder. Sir, I ask your Pardon for troubling of you ſo long; but as a Judge, I thought my ſelf in Duty bound to give my Reaſons why I muſt give my Negative to the Bill. I hope no man doubts but I am as Zealous for this Government as any man whatſoever; but let Gentlemen think what they pleaſe, I can't give my Vote to the paſſing of the Bill.

Mr. Sol. Gen. This is a Bill for attainting Sir *John Fenwick* of High Treaſon; it is the greateſt Crime we know in the Law, and I think the greateſt Crime known in any Government; it is much greater than Murther, or any other Crime, becauſe it ſubverts the Government, and the Law whereby thoſe Crimes are puniſhed, and whereby ill Perſons ſhould be deterred from committing thoſe Crimes, and Innocents ſhould be protected.

It hath been a Queſtion by the Counſel at the Bar, (I think both of them,) Whether this Matter of which Sir *John Fenwick* is indicted and accuſed, is High Treaſon, or not? I muſt confeſs, I heard ſomething of it without Doors, and that theſe Gentlemen would undertake to make it out, that though their Client ſhould be prov'd guilty of the Matters charged upon him, yet that it was not High Treaſon; I thought it ſomewhat a bold Undertaking, but I did not

not think they would have undertaken it, as to the Matter of the Crime; I thought they would have pretended that there had been ſome Flaw in the Indictment, That the ſame as laid in the Indictment, or in the Bill in this Houſe, was not High Treaſon, but not to have queſtioned the Nature of the Crime, as now they do.

To maintain their Aſſertion, they ſay, That admitting their Client to be guilty of what he is accuſed of, it amounts to no more than a Deſign to levy War againſt the King, and deſigning to levy War againſt the King is not High Treaſon, and for which they quote the Opinion of a Perſon within theſe Walls, and one of the King's Counſel, by which deſcription I believe they mean my ſelf; and I thank them for the Honour they do me, when they quote, as they do, my Lord Chief Juſtice *Hales* to be of the ſame Opinion; both which is true, and I think they ſaid ſomething of my Lord *Dyer*, to the ſame purpoſe, and I will give them another good Authority to the ſame purpoſe into the Bargain, which is my Lord *Cook*, who ſays expreſly in his Comment on the Statute of *Edw.* 3. That deſigning to levy War is not High Treaſon; and ſo is my Lord Chief Juſtice *Hales*'s Opinion to be underſtood, who repeats the Words of the Statute about levying War, and ſays, (and quotes my Lord *Coke* for it,) that only actual levying War, and not deſigning to levy War, is High Treaſon, which muſt be underſtood of Treaſon within that Statute, and not of Treaſon at Common Law. And as for the Perſon within theſe Walls they ſpeak of, he was ſo very ſenſible of this Diſtinction, that his Words confine the deſigning to levy War to be not Treaſon within the meaning of the Statute of *Ed.* 3. but doth not deny it to be Treaſon at the Common Law: If therefore this Tryal had been before the Juſtices of the *King's Bench*, *Oyer and Terminer*, or Goal Delivery, theſe Gentlemen had ſaid very materially for their Client, that Statute confining thoſe Courts

Courts to the Connuſance of the Treaſons declared by that Statute, and taking from them the Connuſance of any other Treaſons at the Common Law. But this being a Tryal in Parliament, which that Act declares in future Times would take Connuſance of other Treaſons than what in that Act are expreſs'd, and Parliaments in ſucceeding Times having always adjudged other Treaſons than what in that Act declared.

Admitting what the Counſel ſay to be true, That deſigning to levy War is not Treaſon by that Statute, it is not at all to the purpoſe, in reference to the Matter in queſtion; but I own this is a Matter I juſt now thought on; for tho' this is not a good Anſwer to the Objection when made in this Proſecution, and in this Place, yet it is an Anſwer to the Objection, if it had been made on the Proſecution in another Place where this Matter was before it came here, *viz.* before Commiſſioners of Goal Delivery, but I muſt own I do not believe it was then conſidered whether a Deſign to levy War againſt the King was Treaſon, or not, nor was there any Occaſion for it. The Crime of the Priſoner at the Bar being a Treaſon of another Nature, (that is to ſay) Treaſon in deſigning to depoſe the King, which was always held to be High Treaſon within the Words of the Statute, *Compaſſing and Imagining the Death of the King*, (that is to ſay,) deſigning his Death in his politick Capacity, and it is not material by what Method that Deſign is to be brought about; it is not a leſs Crime to do it by the Method of levying War, than by any other way, but rather a greater; and I challenge any Perſon to ſhew me the Opinion of any Lawyer that ſo much as doubted whether deſigning to depoſe the King was High Treaſon; and my Lord *Coke*, and my Lord *Hales*, in the ſame Pages that they ſay, That deſigning to levy War is not Treaſon within the Words or Meaning of that Statute, expreſly ſay, That deſigning to depoſe the King is High Treaſon within the Words of that Statute.

tuté, *viz. Compaſſing and Imagining his Death*: And I will likewiſe challenge any Man to ſhew me, if he can, that admitting the Evidence given againſt the Priſoner is true, that the Priſoner was not deſigning to depoſe the King, and for this purpoſe take the State of this Caſe, and that of my Lord *Ruſſel*, which hath been mentioned by the Council; in that Caſe, the great Matter was, That the ſaid *Ruſſel* and others ſent ſome Perſons to view the Guards, (it was ſaid in order to ſeize the King, but that was not proved.) This was pretended to be Evidence againſt my Lord *Ruſſel*, of a Conſpiracy to levy War againſt the King, tho' in another Caſe, it was ſaid by the Court, That it was not ſo much a Conſpiracy to levy War againſt the King as againſt the Guards, but there was no Evidence either precedent or ſubſequent to the Meſſage to what purpoſe that was deſigned. The Caſe in queſtion is of a quite different nature: Captain *Porter* hath given you an account of it, (and I think *Goodman*'s Examination is to the ſame purpoſe,) That the Conſpirators met at the *King's Head* Tavern in *Leaden-hall-ſtreet*, and conſulted how to bring back King *James* again; and the only method they could think of, was to ſend *Charnock* into *France*, to King *James*, to deſire him to prevail with the *French* King to ſend them 10000 Men, and that they would meet thoſe Forces here with 3000 Horſe. And for what purpoſe was this? It was to bring back King *James* again. I would be glad to hear if thoſe Gentlemen that were at the Bar, or any body elſe, could ſay this was any thing but a Deſign to depoſe King *William*; and becauſe it may ſeem a little hard to puniſh a Man capitally for the bare deſigning to depoſe the King, where the Effect did not follow, pray give me leave to ſpeak a Word or two to that matter.

Treaſon againſt the Government is of a different Nature from all other Crimes: Deſigning to murder a Man, (though a Father,) or to rob, is a Miſdemeanour,

meanour, and no more; and as ſuch, is puniſhable to deterr others from deſignng the like; but the Miſchief of that Deſign, neither to the Government, nor the Perſon deſigned on, is not very great; for when the Matter is diſappointed, the Perſon deſigned on is at the worſt but frightened, and ſometimes he is in perfect Safety before he knew he was ever in danger. But it is not ſo in Treaſon, a Deſign of that nature ſhocks a Government, and exceeds the Damage done by the committing thoſe other Crimes; as take this for Example. Did not the Agreement of ſome Perſons here, (I do not yet ſay Sir *John Fenwick* was one of them,) to raiſe ſome Horſe here, and with them join the *French* on their landing? Did not that, I ſay, encourage the *French* to come? And did not that Deſign of the *French* put this Nation in Arms, for their neceſſary Defence? And did not the Charge of that come to more than all the Loſs the individual Subjects here loſt by Robberies for more than Seven Years paſt? and yet Perſons guilty of thoſe Crimes we can be contented, without any Reluctancy, to ſee deſtroyed every Day, though perhaps driven to the Courſes they took by Neceſſity. But theſe Men we think hardly uſed, though the Miſchiefs they brought on the Nation was not by Neceſſity. And I would have another thing conſidered: Was not the Government neceſſitated to ſecure in Priſon all they ſuſpected, and amongſt them ſeveral innocent Perſons? And was not the Miſchief of that too to be charged to the account of thoſe guilty of the Deſign you are now enquiring of? I ſay, let theſe things be conſidered, and it will not be found that thoſe guilty of the Deſign in queſtion are hardly uſed. And ſo much for the matter of Treaſon as it is charged in the Indictment.

The next thing to be conſidered, is the ill Conſequence of ſuch a Precedent, of the attainting a Man of Treaſon by Act of Parliament, which the Counſel

ſel at the Bar have ſaid hath been always blamed, and ſometimes even by Parliaments themſelves.

I muſt confeſs, I am not afraid of a Precedent of this kind: I believe if theſe Gentlemen would but look a little back, they would ſee the Attainders by Act of Parliament to have been ſo few, that there would be no reaſon to be afraid of the Conſequence of theſe Precedents. I dare ſay, there have been more Men deſtroyed by the irregular Judgment of one Commiſſion of *Oyer and Terminer* than by all the Acts of Parliaments of this kind ſince Parliaments have had a Being, and yet we have not thought fit to lay aſide thoſe Commiſſions.

The Truth is, it hath been the irregular Proceedings in obtaining thoſe Acts have been blamed, and not the making uſe of the Legiſlative Power for that purpoſe; and therefore conſider the Acts of Attainder mentioned by the Council, which have been blamed, and firſt, that of my Lord *Cromwel* which my Lord *Coke* blames: One of the Council at the Bar pretended to repeat my Lord *Coke*'s Words of that Matter at large; but he did not deal ſo candidly with you in that matter as he ought to have done; for he ſhould have repeated all my Lord *Coke* ſays on that Subject, which was, That *Cromwel* was never brought to anſwer, never permitted to ſay any thing for himſelf, either in Parliament or elſewhere, and for that Reaſon alone my Lord *Coke* blames that Precedent. Now, pray Sir, is this the preſent Caſe? Hath not Sir *John Fenwick* been heard by you? I would be glad if theſe Gentlemen, or any body elſe, could ſhew that any Perſon hath had ſo fair an Hearing before Commiſſioners of *Oyer and Terminer*, as Sir *John Fenwick* hath had before you.

As to Sir *John Mortimer*'s Caſe, which was in the Second Year of *Hen.* 6. it is much of the ſame nature: My Lord *Coke* ſays, There was a Jealouſie that the *Mortimer*'s Title to the Crown was better than that of the Houſe of *Lancaſter*, and therefore to put

put a Slurr (a Blemiſh I think my Lord *Coke* calls it) upon that Title, it was pretended, That Sir *John Mortimer* ſhould give out, That the Earl of *March* ſhould be King by Right, and that himſelf was Rightful Heir to the Crown after the Earl: And if the Earl did not Challenge the Crown, he would pretend to it himſelf; and that he would for that purpoſe go into *Wales*, and raiſe an Army of Ten Thouſand Men. Of which words Sir *John Mortimer* was Indicted, but that Indictment being meerly feigned and inſufficient in Law, they were not able to proceed that way, and therefore they made it good by an Act of Parliament, and Sir *John* was brought into the Parliament, and without Arraignment or Anſwer, was condemned. So that my Lord *Coke*'s Complaint is this, That thoſe Perſons ſo condemned, were never heard. And if this be the truth of the Matter, theſe Precedents, with Submiſſion, have no affinity to yours; but I believe it may be ſaid in this Caſe, that Sir *John Fenwick* hath been heard, and that more than ever any one in Parliament was before in any Capital Matter.

And as to the Caſe of my Lord *Strafford*, he had Counſel aſſigned him, to ſtand by and hear, but not to prompt him. If there aroſe any Point of Law, he was himſelf to propoſe the Matter to the Lords, and the Counſel was to aſſiſt him only when the Lords ſo directed them. But in the Caſe here before you, you have allowed Sir *John Fenwick* Counſel, not only to aſſiſt him in point of Law, but to aſſiſt him in point of Fact too; and they have made Anſwers for him as to Law and Fact. So that I ſay, he hath been tryed fairer than any Man ever was in Parliament, be it upon Bill, or upon Impeachment.

And further, as to the ſaid Earl of *Strafford*'s Caſe, the Act which Reverſes his Act of Attainder, recites and blames the Methods whereby that Act of Attainder was obtained. As that an armed Multitude came down to *Weſtminſter*, and filled both the *Palace-Yards*, and all the Approaches to both Houſes of Parliament,

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and with Fury required Juſtice againſt the ſaid Earl, and poſted up the Names of ſuch as were for the ſaid Earl, and called them *Straffordians*, and Enemies to their Country. And by ſuch ways that Act paſſed, nothing of which can be pretended in this Caſe.

It was objected, That though a Judge do think in his Conſcience a perſon Guilty, or not Guilty, yet he ought not to make uſe of that private Knowledge. And a Caſe was quoted out of *H.* 4. for that purpoſe, That a Man was convicted before a Judge, and condemned by him for a Crime, of which the Judge knew him innocent. And from thence inferred, that we, as Judges, could not do Sir *John Fenwick* Right, ſince, as Judges, we could not make uſe of our private Knowledge. But I think the Authority of that Judge ought not to weigh with us, for I think that Judge might have behaved himſelf better than he did, and ſure I am, now he would have been blamed. I do not ſay, that a Judge, in his own private Opinion, ought to Judge, he ought not; but if a Judge upon the Bench knows any thing whereby the Priſoner might be acquitted, or convicted (not generally known) then, I ſay, he ought to go from the Bench to the Bar, and give Evidence of his Knowledge to the Jury, if there were enough in Commiſſion upon the Bench to maintain the Preſence of the Court, as there generally is. And ſo the Judge in *Henry* the Fourth's time ought to have done, and not to have ſuffered the Perſon to be convicted, and then get a Pardon for him: For a Pardon will not always do the buſineſs; for there may be a Forfeiture, that the King's Pardon doth not reſtore. But though we act as Judges here, we don't act only as Judges, I thought we were as well Tryers, or a Jury to paſs on this Fact, as well as Judges: And it is the Duty of every Jury-man to give a Verdict on the Matter tryed, according to his own Knowledge of the ſame, if he have any knowledge of the ſame. There is difference between the Judicature of *Weſtminſter-Hall* and this

Court: They are to Judge upon a Fact found by a Jury, but we act both the Part of a Jury in Trying, and alſo of Judges, in Judging what Crime the Fact amounts to. So that if a Jury-man may make uſe of his Private Knowledge to acquit a Priſoner, as I think no body doubts but it is his Duty to do, then every Gentleman in this Houſe may make uſe of his Private Knowledge to Acquit the Priſoner, or Convict him. And ſo much for the Method of proceeding by Bill of Attainder.

The laſt thing to be conſidered is the Evidence, and in that Matter theſe two things are to be chiefly conſidered; Whether what *Goodman* ſwore againſt Sir *John Fenwick* (*Goodman* not being now here) is Evidence againſt Sir *John Fenwick*. And if it be not, whether Sir *John Fenwick* may be juſtly Attainted by this Bill, upon the Evidence of one ſingle Witneſs only?

It is agreed of all Hands, That at the Common-Law, in all Capital Crimes, as well Treaſon as any other, this of *Goodman*'s had been good Evidence; and likewiſe that a Man might have been convicted upon the Evidence of one ſingle Witneſs. It is agreed on all hands, that in all other Capital Crimes (but Treaſon) at this day, this of *Goodman*'s is good Evidence; and one ſingle Witneſs, if credited by Twelve Jury-men, is ſufficient; and an Hundred Witneſſes, if not ſo credited, is not ſufficient to Convict a Perſon of a Capital Crime. And it is agreed of all hands, That ſince the Statutes quoted of *Ed. 6.* this Evidence of *Goodman*'s, nor one ſingle Witneſs, is not ſufficient to Convict a Man for Treaſon in the Court of *King's-Bench*, nor in any other inferiour Court of Juſtice. The ſingle Queſtion therefore is, Whether thoſe Statutes, or the late Act *for Tryal of Treaſons*, ever were deſigned to bind, or do any ways bind or influence the Proceedings in Parliament for Treaſon by Bill of Attainder, or whether thoſe Rules the Parliament gives the Courts below to proceed by, ought

ought in Juſtice to be the Rules you ought to proceed by in this or the like matters.

I believe that no Perſon that reads the Statutes, can pretend to think that they had any reſpect to proceedings in Parliament. For, to give but one Reaſon for a great many: Thoſe three Statutes that require two Witneſſes to Convict a Perſon of Treaſon, except in one Caſe, which is, where the Perſon *Arraigned* confeſſes himſelf Guilty; in that Caſe the Statute doth not require two, nor any Witneſs. Now, every Man knows that the word *Arraigned* is proper for the Court of *King's-Bench*, and other inferiour Courts, and perhaps for the Parliament where Proceeding is by Impeachment, but never when the proceeding is by Bill. Nay, the Party accuſed was heretofore rarely brought into Parliament when the proceeding was by this way, and not unleſs he himſelf deſired it. And as for the Earl of *Strafford*, though he was preſent when he was proſecuted by Impeachment, yet after the Bill of Attainder voted againſt him, he was never heard in Perſon, nor by Counſel againſt it. The Expreſſions therefore of thoſe Statutes no way ſuiting this Caſe, it can never be thought that thoſe Law-makers intended by thoſe Statutes to bind proceedings in Parliament in the like Caſes to this, and the rather, becauſe they could not but know, that if they had deſigned it, they could not have done it, becauſe ſubſequent Parliaments, or the ſame Parliament in another Seſſion, might have Repealed their Acts two ways, either by expreſs words, or might Repeal them by Implication, without mentioning the Acts in a particular Caſe; for if the matter of a ſubſequent Statute in a particular Caſe is contrariant to the Matter of a former General Statute, it is an Appeal of the former General Statute, *pro tanto*.

And as for the laſt Matter, how far it is fit for us to Judge by thoſe Rules we give to Inferiour Courts of Judicature, I believe there is no Perſon but in the ordinary acts of his Life doth every day determine it;

for he gives thoſe Rules to his Servants to act by, as he doth not always Govern himſelf by in particular caſes, as having a better Opinion of his own Underſtanding, Integrity, and ſuch-like Qualifications, than he hath of thoſe Perſons to whom he preſcribes Rules to walk by. And it is plain by the Clauſe of the Statute of *E.* 3. before-mentioned, that Parliaments were not intended to be bound by thoſe Rules they preſcribed to Inferiour Courts of Juſtice, when they expreſly forbid the Inferiour Courts to Condemn any Perſon as a Traitor, for any other Crime than what is declared in that Statute; and yet in the ſame breath, as as it were, declare, That the Parliament ſhall in future Ages condemn Perſons as Traitors for other Crimes than what is in that Statute expreſt. The whole matter therefore, as to this laſt point, ſeems to be, Whether we do believe Sir *John Fenwick* Guilty of what he is accuſed; and if we do, it is not material whether ſuch our belief is founded upon the Evidence but of one, or of more Witneſſes: Or upon the Evidence of a Depoſition, or of a Witneſs, *viva voce*, in Court. To believe, or not to believe is in no man's power; he may indeed diſguiſe his Thoughts to another, by ſaying, he doth, when as in truth he doth not believe, *& è contra*, but he cannot deceive himſelf, and not believe a thing to be true, becauſe he wiſhes it was not true.

Upon the whole matter therefore, I think if any Gentleman doubts whether Sir *John Fenwick* is Guilty of the Crime of which he is accuſed, or doubts whether that Crime be High Treaſon, or whether he be Legally Proſecuted, that Gentleman in Conſcience ought to be againſt this Bill. But if any Gentleman is fully ſatisfied that Sir *John Fenwick* is Guilty of what he is accuſed, and that his Crime is High Treaſon, and that he is Legally Proſecuted, I think that Gentleman in Duty to his Country, ought to be for this Bill. I think he is Guilty, and that his Crime is High Treaſon, and he is Legally proſecuted, and therefore I am for Committing the Bill. *Mr. Harcourt.*

Mr. Harcourt. I can readily agree with the Gentleman that ſpoke laſt, that High Treaſon is the greateſt Crime in the Law; and further, That the Matter of the Indictment that is mentioned in the recital of the Act, is undoubtedly High Treaſon; and I am ſure he will agree with me in one thing alſo, That the greater the Crime is that any Perſon is accuſed of, the clearer the Proof ought to be, by which he is convicted.

Some Gentlemen have begun their Diſcourſe in Relation to our Power, but ſure 'tis no Argument becauſe I can do a thing, therefore I will do it, becauſe we have Power to Repeal *Magna Charta*, and all other ſubſequent Laws which have been made in Favour of Life, and Liberty, and Property, by the ſame Conſequence we ought to do it: A better Reaſon muſt be given me, before I conſent to this Bill.

Then for the Precedents, 'tis ſaid, There have been many, and many have been mentioned; and if I thought it worth while, I could mention many more you have not heard of: As for Precedents in general, they are ſo far only imitable as they are grounded upon true Reaſon, and agreeable to Juſtice; but I don't remember any one Precedent of this Nature, of a Perſon in Cuſtody, forth-coming, to be Tryed, yet Attainted without a Tryal at Law, but what has been Univerſally branded; and they all ſeem to be Reproaches even to thoſe Ill Reigns in which they were uſually made; and rather to be marked out as Rocks for us to avoid, than Patterns for our Imitation.

Before I particularly mention the Facts how they ſtand before you, I would beg leave to obſerve ſomewhat upon the general Method of your Proceedings, and tell you what ſtaggers me in it.

I have often heard this called a Tryal, and that we are the Judges. The Gentleman that ſpake laſt gave us another Title, and told us we were the Jury alſo. I know no Tryal for Treaſon, but what is confirmed by *Magna Charta*, *per Judicium Parium*, by a Jury,

which is every Engliſhman's Birth-Right, and is always eſteemed one of our Darling Priviledges, or *per Legem Terræ*, which includes Impeachments in Parliament; but if it be a Tryal, 'tis a pretty ſtrange one, where the Perſon that ſtands upon his Tryal, hath a Chance to be hanged, but none to be ſaved. I can't tell under what Character to conſider our ſelves, whether we are Judges or Jury-Men? I never heard of a Judge, I am ſure not of a Jury-Man before, but he was always upon his Oath: I never heard yet of a Judge, but had Power to examin Witneſſes upon Oath, to come to a clear Sight and Knowledge of the Fact, I never heard of a Judge, but if a Priſoner came before him, the Priſoner was always told, he ſtood upon his Deliverance, and he had not only a Power to condemn the Guilty, but to ſave the Innocent. Have we this Power? Suppoſe upon ſuch a Tryal as this (if it muſt be called ſo) it may ſo happen, that a Perſon that comes before us, ſhould be the Innocenteſt Man in the World; What Judgment is it that we can give, for ſo much as ſuch a Perſon hath made his Innocency fully appear? Is the Speaker by his Warrant to ſend him back again to *Newgate*? You can't diſpoſe of him otherwiſe, though you were ſatisfied of his Innocency: But in ſuch a Caſe, the Party muſt undergo a double Tryal, which is contraray to all Rules I have heard of. If I am a Judge in this Caſe, I beg leave to tell you for my own Juſtification only, what a Definition I have met with of a Judge's Diſcretion; My Lord Chief Juſtice *Coke* ſays, 'Tis *Diſcernere per Legem*; and by that Diſcretion I beg leave to conſider this Caſe, if Judges make the Law their Rule, they can never Err; but if the uncertain arbitrary Dictates of their own Fancies, which my Lord *Coke* calls the crooked Cord of Diſcretion, be the Rule they go by, endleſs Errors muſt be the Effect of ſuch Judgments.

As to this particular Caſe, I did expect from the Gentleman that ſpoke laſt, that he would have told you there

there was a plain Evidence why you ſhould go on to the paſſing of this Bill; but inſtead of that, I am ſurprized to hear a thing mentioned, that in Parliamentary Proceedings, a Man may be hanged by one Witneſs, certainly that is not to be taken for granted.

As to this particular Caſe, I would take Capt. *Porter* as upon his Oath for Suppoſition: You have one Witneſs againſt Sir *John Fenwick* of High Treaſon, and with your leave, deſire to Examine what you have more in this Caſe.

Yeſterday you Voted a Paper to be read, *Goodman*'s Narrative, or Examination; 'tis a different Caſe now. Now you have it before you to Determine upon. Yeſterday the Queſtion was only for hearing: Let Gentlemen now conſider how far they ought to believe it, and the other Evidence we hear. And firſt, there is ſome Evidence that *Clancy* tampered with *Porter*, and gave him a Summ of 300 *l.* and ſo they would infer, becauſe *Porter* was tampered with to be gone, therefore *Goodman* was. It was told us further (and I deſire I may be informed if I am miſtaken) That *Clancy* ſaid he came from Sir *John Fenwick*, and afterwards my Lady *Mary Fenwick* ſaid ſhe would make good what *Clancy* had ſaid; and from theſe Arguments they preſume that Sir *John Fenwick* knew of it. Give me leave to tell you a Rule I never heard contradicted, That Preſumption is to be made in favour of Life, but to preſume a Man Guilty becauſe *Porter* was tampered with by another, becauſe he ſaid it was by Sir *John Fenwick*'s Order; ſhall we preſume Sir *John Fenwick* did it? Is Hearſay to be Evidence, or is a Man to be had to the Gallows upon Preſumption? How often, and with how much Reaſon have we heard Exclamations againſt Judgments, upon Preſumptions, *Inuendoes*, Conſtructive, Accumulative Treaſon? *&c.*

Gentlemen, there is ſome further Evidence; and that is, of what was Sworn at *Cook*'s Tryal, and ſome Gentlemen thought fit to have the Record read, and

an Examination of what was Sworn there. I can never go ſo far as to think it Reaſonable, That what Evidence hath been given in one Caſe ſhould affect another Man; but all this is to be Anſwered, by calling it Parliamentary Proceedings. No doubt 'tis no Evidence in the Courts below, but they are mentioned with ſome kind of Diſdain, as very inconſiderable. In this Caſe, I beg leave to ſay this in their Vindication, That whatever the Rules of *Weſtminſter* Hall are, 'tis not therefore Reaſon becauſe 'tis a Rule, but becauſe 'tis Reaſon, and Reaſon approved of by long Experience, therefore 'tis a Rule, and if they make their Rules for that Cauſe, I hope this is a Cauſe why we ſhould imitate them: But I would not have thoſe Rules thought Matters of Form, but Subſtance, or more properly part of the Law it ſelf.

Upon the whole Matter, if no Gentleman will give us a Reaſon why this is Evidence, but it muſt be taken for granted, here is but one Witneſs, and that not upon Oath; and if we are to come to our Parliamentary Diſcretion to ſupply that Defect, the Want of the other, 'tis a Diſcretion I will diſclaim all the Days of my Life. And I hope you will reject the Bill.

Lord Cutts. If, Sir, the Gentleman that ſpake laſt had been ſpeaking in *Weſtminſter* Hall, I ſhould think that he had ſhewed a great deal of Reaſon, and ſpoke with a great deal of Judgment: But ſince I think you are here, upon a quite different Foot, I ſhall not follow him (becauſe I will not unneceſſarily detain you) to anſwer every particular.

I remember when the Counſel for the Priſoner firſt ſpake, they took Notice to you, That Precedents were Procreative, and one begat another, and are apt to Multiply; therefore, I do think, 'tis of the higheſt moment to you, what Precedent you make to Night: And if any Gentleman can be ſatisfied, That the Precedent of not paſſing this Bill will not be of worſe Conſequence than the Precedent of paſſing it, I ſhall humbly ſubmit. I do think, Sir, the Matter before

you

you is really of the higheſt Importance; and I muſt confeſs, 'tis with a great deal of Satisfaction to my ſelf, that I do ſee Gentlemen ſeem to apply themſelves with a great deal of Seriouſneſs to this Debate. Sir, I ſhall not pretend to make a particular Anſwer to what the Counſel for the the Priſoner did ſay, as to the Precedents of Acts of Parliament; I think this Anſwer is ſufficient at preſent for that, That if we have no Precedent, we are under a Neceſſity of making one. It is told us, That of all the Precedents none will juſtifie us in this Proceeding; but at the ſame Time it muſt be conſidered, That we are in a Caſe, the like to which never yet hapned in *England*.

The firſt Thing I ſhall apply my ſelf to, is the Juriſdiction of Parliaments; and truly, I think, it will be very neceſſary to ſay a little upon that. I have heard none call their Power in Queſtion, the Thing ſpeaks it ſelf; 'tis the Legiſlative Power, and the Etymology of the Word tells you what it is; 'Tis a Power that can make Laws, and aboliſh them; a Power that is ſuperior to all other Powers whatſoever, and we are part of that Legiſlative Power, and therefore ſhall ſay no more to that, it being a matter agreed, That we have a Power to proceed in this Matter. Now I will take leave to obſerve ſomething as to the particular Caſe before you.

Though a Gentleman that ſpake ſome time ſince, did ſpeak to you of the nature of the Crime; yet, with Submiſſion, I think there remains ſomething to be added to what he ſaid. The Conſpiracy of which Sir *John Fenwick* to me appears Guilty, is not only againſt the Life of the King, not only to depoſe the King, not only a Conſpiracy to raiſe Rebellion; but at the ſame time to contrive an Invaſion from *France*, and bring in a Foreign Power. I know not what better Expreſſion to tell my Thoughts in, than by uſing a Term which Phyſicians uſe in ſome deſperate Caſes; they tell you, There is a Complication of Diſtempers, and I think this is a Complication of Treaſons:

This

This is the higheſt Crime, and it is attended with all the aggravating Circumſtances this Crime can admit of. Now in giving our Opinion, and paſſing our Judgment upon this Matter, I think there are two Conſiderations ought to Guide us; there is a Conſideration we owe to the Priſoner that is brought before us, and another Conſideration which we owe to the common Security. As to the firſt of theſe, it being a Matter of Blood, wherein the Life of an Engliſhman, the Life of a Gentleman of his Quality and Figure is at Stake, we ought to proceed with all the calmneſs that is poſſible; and I do agree, if there was nothing but Preſumption, that ought to be in Favour of Life. But pray let us conſider how this matter ſtands: Let me deſire thoſe Gentlemen that are of Opinion we ought to have ſo much Tenderneſs for the Priſoner, to lay before them another Scene, and ſort of Conſideration. At the ſame time, I do conſider the Hardſhip (if I may uſe that Expreſſion) of paſſing this Sentence, I do conſider what a Condition we had been in, if the Contrivance that was laid had taken effect; that is the weightieſt Part of the Matter before you: And though it was diſappointed then, I know not how far off 'tis at preſent; this ought really to weigh with you. And I hope I may take leave upon this Occaſion to obſerve to you, what one of the wiſeſt and beſt of the Romans ſaid upon an Occaſion of this Nature; he tells you, That a Man that would conſider his Duty aright, muſt conſider the Matter in all its Parts and Circumſtances; and when that is done, muſt act adequate, as well to the Community, as to himſelf and his Neighbour. I would apply that to the preſent Caſe; and would deſire thoſe Gentlemen that expreſs ſo much Tenderneſs in this Caſe, to have ſome for the Government, and themſelves.

It is told you, That the Priſoner before you does not ſtand convicted of any Crime: It was told you at the Bar, That the moſt we ought to pretend to, is

no

no further than to leave him in the Condition we found him: I think, with Submiſſion, the Priſoner ſtands convicted of High Treaſon, with the higheſt Conviction upon Earth, and that is, the general Conſent of all Mankind; for I will be bold to ſay, I do verily believe, that there is not one Gentleman within theſe Walls, nor that walks the Streets, not a living Soul, that doubts of his Crime. But, Sir, I would put this Matter yet further; I am not only ſatisfied in my own Conſcience and Reaſon, of the Juſtice of your Proceedings, which ought indeed to be the Foundation of every Man's Opinion: But I am ſatisfied, that in this Way, there is no Hardſhip impoſed upon Sir *John Fenwick*, if he will be his own Friend: For, upon what hath paſſed in this Proceeding, before Things are brought to the laſt Extremity, if Sir *John Fenwick* be his own Friend, if he be ſo much a Penitent and Friend to the Government, and to Poſterity, to tell Truth, and leave off his Diſſembling, and be plain, I doubt not but he will find Favour. Now, Sir, I would beg leave only to Anſwer one or two Objections; for ſome Things that have been ſaid againſt the paſſing of this Bill, I do not think material.

One Objection that ſeems to me to carry the greateſt appearance of Weight, was made by one of the Counſel for the Priſoner. He ſaid, it would look ſtrange in after Ages, that the ſame Parliament ſhould paſs the Bill for Regulating of Tryals in Treaſon, and this Bill of Attainder. Sir, I deſire you will pleaſe to obſerve how this Matter ſtands; and in the firſt place, as previous to that, I take leave to obſerve a few things: 'Tis a Propoſal generally agreed of, and not to be denied, That that which is deſigned for the Preſervation of any Creature, ought not to be made uſe of to its Deſtruction. Now this Treaſon Bill was deſigned for your Preſervation, to skreen you againſt the Danger of Arbitrary Power, and the Malice of Falſe Witneſſes; and this Bill of Attainder is brought

to

to skreen both you and the Government from your Enemies, both abroad and at home. And I think the Treaſon Bill is no Objection upon theſe Conſiderations: Beſides, the Treaſon Bill was only made to be a Rule to Inferiour Courts. The learned Gentleman that ſpake laſt, told you, The Rules of *Weſtminſter-Hall* were not Rules, becauſe they were obſerved there; but becauſe they were grounded upon Reaſon. Why, Sir, in Anſwer to that, I will only take leave to tell him, That that which is Reaſon in *Weſtminſter-Hall* does not carry the ſame Weight here. I think that Matter was ſo well explained by the Learned Gentleman at the Bar, that there needs nothing be added to it. He told you very well, 'Tis one Thing what I truſt to do by my Servant, and another Thing what I do by my ſelf. It is very obvious to any man's Underſtanding, if this Power were lodged in the Judges, what uſe they might make of this unlimitted Power; but no Gentleman can miſtruſt any Thing that ſhall be done by this Houſe.

Another Objection that was made by the Counſel for the Priſoner, was; ſays he, This is Evidence, or it is no Evidence; if it be Evidence, then, ſays he, Why do you not Try him at Law? If it be no Evidence, Why do you admit here? Now, Sir, with Submiſſion, this carries the Face and Form of an Argument, but if you take it a-pieces, I think there is no convincing weight in it: For, Sir, the Reaſon why this Matter comes before you, is becauſe by the abſence of one of the Witneſſes, according to the formal part of the Law, Sir *John Fenwick* will be acquitted; but it is generally agreed, that the Conſequence of ſo great a Crime going unpuniſhed, may be dangerous to your Poſterity. This Bill of Attainder is brought into the Houſe, that you may ſupply that want of Form, you being convinced of the reality of his Crime.

Another Objection made by the Counſel at the Bar was, as to Capt. *Porter*, whom he reflected upon:

Says

Says he, Shall a Man that hath owned himſelf guilty of ſuch a Villany as the Murther of the King, of a ſudden, have ſuch Credit as to ſway with you? I would take leave upon this Occaſion, to repeat to you what my Lord Chief Juſtice upon the Bench did obſerve at *Charnock*'s Tryal, (this ſame thing was urged and preſſed home by *Charnock*,) and my Lord Chief Juſtice was pleaſed to take notice, That it conſiſted with the Wiſdom and Juſtice of all States and Governments, to allow of ſuch Evidence, becauſe without it they could never come to the Knowledge of any Treaſon or Conſpiracy: For he added, Who will you have an Account of theſe things from, but the Actors of them?

And therefore when they are penitent, and willing to attone for their Crime, by doing all the Service they can to the State, and Juſtice to Mankind, we ought not only to receive but encourage them.

When the Danger the Government would be in, if you did not paſs this Bill, was urged; it was anſwered, But what Danger will you and your Poſterity run in Paſſing of it? I think that Matter appears ſo plain and clear before you, that when all the other parts of the Queſtion are paſſed over, I ſhould think it a Reflection upon the Houſe to enter upon a particular Anſwer to it: I have not ſaid what I have ſaid, that I think any part is deciſive, but to clear my ſelf to the World for the Opinion I am going to give, and perhaps what I have ſaid, may give occaſion to ſome others to ſay ſomething that may be much more to the purpoſe; but for the Reaſons I have given, I am for the Bill.

Mr. Sloane, Sir, I as little care for medling in Matters of Blood, as any Man, and ſhould be glad to avoid giving my Opinion in this Caſe; but I think 'tis incumbent upon every Gentleman that hath the Honour to ſit here in Point of Truſt; I think 'tis his Duty to them whom he repreſents, to the King and Kingdom in general, to give his Opinion when he is clear

clear and ſatisfied in it; and if I was in the leaſt diſſatisfied, I ſhould venture the Diſpleaſure of the Houſe to be abſent; but upon the whole Caſe, and the Proof that hath been given, I am very clear that Sir *John Fenwick* is guilty of this Treaſon that he is accuſed of; and that it is Treaſon without any ſtrain, and well warranted by Precedents.

I would firſt take notice of what is ſaid to your Juriſdiction in general; I remember it was ſaid this was an Incroachment upon *Magna Charta*; for by that, no Perſon is to be Tryed for his Life, but by the Judgment of his Peers. Thoſe Gentlemen that have made that Objection, have entirely forgot the other part, which is the next Sentence; *Nec ſuper eum ibimus, nec pro eo mittemus, niſi per legale judicium parium ſuorem vel per legem terræ.* What do they make that to be? 'Tis true, in the ordinary courſe of Juſtice Perſons muſt be Tryed; a Commoner by a Commoner, and a Peer by a Peer; but there are ſeveral ſorts of Tryals and Laws in the Land: And when you come to conſider what is meant by *per legem terræ*, you have the *communis Lex terræ*; you have the Statute Law, and *Lex loci*, the Laws of particular Mannors; and there are ſeveral ſorts of Tryals beſides that by Jury. There are Tryals by Battle: The Defendant in caſe of Appeal may Try it by Battle, and he that is killed loſes the Judgment. Then there is a Law above all theſe Laws, and that is the Law of Parliament, which my Lord *Coke* calls, *Lex Parliamenti & Lex Parliamentária*; in another place which he ſays, is, *ab omnibus inquirenda*, but *à paucis nota*; and 'tis not fit it ſhould be known how far they can go, (and ſo 'tis in *Chancery*,) and that of Parliament is a Law unlimitted, and that is one of the Laws ſaved by *Magna Charta*, and is included in *Legem terræ*: I ſay therefore, that without any Incroachment upon *Magna Charta*, or any Law whatſoever, you enter regularly upon this Tryal.

I would

I would anſwer another thing that was ſaid againſt a Tryal in Parliament, and I muſt confeſs I did wonder to hear it from that honourable ancient Member, That if he was to be Tryed, he ſhould rather chooſe to be Tryed in *Weſtminſter-Hall.* Why, Sir, before I ſhould have given ſo ſudden a Judgment as that, I would have conſidered what my Caſe was: If I had had ſuch a Caſe as Count *Conningſmark,* a bad Cauſe and a great deal of Money, I would rather be Tryed there; or if I could be Tryed as Sir *George Wakeman* was; but if I had a good Cauſe, and would uſe no Corruption, inſtead of Twelve Men that might be corrupted, I had rather be Tryed by 4 or 500 Gentlemen that are beyond it. You ſee how Tryals went below; the Tryal of my Lady *Liſle,* that could neither ſee nor hear, and there came a Perſon to her Houſe that was proved to be in *Monmouth*'s Rebellion, and ſhe was burned for it.

Then as to the Caſe before you, I would firſt offer my Reaſons why I believe this Gentleman to be Guilty. Here is Capt. *Porter,* he hath poſitively ſworn, That he had another Meeting at Mrs. *Mountjoys,* and there they did conſult and agree to ſend *Charnock* over to *France*; and *Charnock* was directed to go with a Meſſage to invite a Foreign Power over here. Now the Queſtion is, Whether he is to be believed? And I would go upon the ſame Reaſons for believing a Witneſs, as they do in *Weſtminſter-Hall*; and will go as far along with thoſe Gentlemen, as to the Credibility of a Witneſs: But if he be to be credited in *Weſtminſter-Hall,* why is he not ſo here? And therefore, if they had brought any Teſtimony againſt his Credit as made him guilty of Perjury, or Forgery, it had been an Objection againſt his Teſtimony; but it was ſo far from that, that they did not offer to prove one Word of that; but what was ſaid, was ſaid from the Counſel, and that is to go for no Evidence. The Counſel indeed did alledge againſt his Credit ſeveral things, but did not prove any; and if they had, they would

would not have taken away his Teſtimony in *Weſtminſter-Hall*, That is, that he was concerned in the late intended Aſſaſſination, and Treaſon. This was the ſame Objection that was made below; and they brought Witneſſes to prove that and ſome other things, but they did not weigh any thing; for if it ſhould be an Objection that he was in the Conſpiracy, then you can have no Evidence of any Villany, for they will never truſt honeſt Men with it. Therefore I do take it, That *Porter* ſtands before you as a very Credible Good Witneſs, without any Imputation whatſoever. Then Sir, ſay they, he is not upon his Oath; that is an Objection to your Juriſdiction; and though they ſay they own your Juriſdiction, yet when they ſay ſo, they ſpeak againſt your Juriſdiction; and by the ſame Reaſon you can go upon no Impeachment whatſoever; for you can in no Caſe give an Oath. Then Sir, they tell you, he is but one Witneſs, and that 'tis in the Caſe of Treaſon, and there ought to be two Witneſſes, and therefore you have Juriſdiction to do any thing whatſoever; yet you have no Juriſdiction to go upon this Cauſe. Now, Sir, becauſe this ſeems to be the moſt formidable Objection that is inſiſted on againſt the Proceedings in this Caſe, I beg your leave that I may fully Anſwer it.

And taking it to be true, that the Fact is proved but by one Witneſs, I conceive we may proceed in this Cauſe, though they can't in *Weſtminſter-Hall*; and I do take it, that there is a great deal of difference between one and the other; and I do not take your Proceedings upon this Bill, being there is but one Witneſs, to be any ſtrain, but what you may extend the Legiſlative to, without going beyond what hath been done. I therefore beg you to conſider what the Law Originally was as to Treaſon, and how it came to be altered. Before the Statute of 25 *Ed.* 3. it was uncertain what was Treaſon, and what was not; then the Statute came and reduced it, that as to all

Inferiour

Inferiour Courts, theſe are your Treaſons, and no other ſhall be adjudged ſo; but the Parliament reſerved to themſelves a Power, that if any Caſe ſhould happen like them, they were to Determine it themſelves. So, Sir, that at that time, and after that time, one Witneſs was good in caſe of Treaſon; as now 'tis at this day for Robbery, Felony, or any other Fact but Treaſon. And till 1 *Ed.* 6. one Witneſs was good in all Treaſons: Then comes two Statutes in *Ed.* 6. time, and the firſt takes notice, That ſince 25 *Ed.* 3. by ſeveral Statutes Treaſons had been made which were unreaſonable, and therefore Repeals them, and makes ſeveral new Treaſons. Then comes a *Proviſo* at the end of it; *Provided always, That no Perſon whatſoever, after the firſt of* February *then next coming, ſhall be Indicted, Arraigned, Condemned, or Convicted for any Offence of Treaſon,* &c. *unleſs the Offender be Accuſed by two Sufficient and Lawful Witneſſes; or ſhall willingly, without Violence confeſs the ſame.* Now that *Proviſo* relates only to the Treaſons particularly mentioned in that Statute. Then comes the next Statute 5 *Ed.* 6. and purſues the ſame Words: But now this did not mean any Facts whatſoever that were left to the Judgment of the Parliament, becauſe thoſe Facts were not within their Cognizance. They are not Parliamentary Words, *Indicted, Arraigned, Convicted,* but only uſed by the Courts below. So that Caſes in Parliament are neither within the words or meaning of the Statute which requires two Witneſſes. Why, Sir, if it be ſo, that one Witneſs is ſufficient, here you have not only one Credible Witneſs, but he is propt up extreamly well by Collateral Circumſtances; and though I do not allow that below they can proceed upon one Witneſs with Pregnant Circumſtances, yet for the Reaſons given, conſidering how this Evidence is propt up, I think it is ſufficient before you. For there was another Witneſs againſt him, and it hath been proved what that Witneſs could have ſaid if he was here; and 'tis plain that Men have died upon

the ſame Teſtimony: I muſt confeſs, when I was for Reading of *Goodman*'s Examination, *&c.* I was not for Reading them as Concluſive Evidence, nor do I think them ſo in any ſort, either the Conviction of *Cook*, or *Goodman*'s Examination before a Juſtice of Peace; but it is a ſtronger Evidence in this Caſe than any other, becauſe the Witneſs is not dead, nor is he withdrawn by the means of any body but the Priſoner, or his Friends; which, as I take it, appears upon the Evidence; and if ſo, I think it comes to the Caſe, That if any one gets my Deeds, if he will not produce them, they ſhall be preſumed to be what I ſay they are: I muſt confeſs, the Acting of his Wife or any Agent, might not be Evidence, if it appeared they did it officiouſly without his Knowledge; but being *Clancy* ſaid he came from Sir *John Fenwick*, and it was for Sir *John Fenwick*'s Advantage, I will believe it was by his Privity: And for my ſelf, I think it no ſtrain, if in this Caſe we take him to be a good Second to Captain *Porter*, though it ought not to be admitted in *Weſtminſter-Hall.*

Then 'tis ſaid, That you have no Juriſdiction to proceed by Attainder in this Caſe, where the Perſon does appear, and he is in the Hands of the Law, and ready to take his Tryal. I quoted you an Inſtance the other Day, 12 *Car.* 2. of the Regicides, where they Attainted Perſons that were dead, without Examining one Witneſs, and I have viewed all the Books ſince, and there's nothing appears, but the Bill Ordered to be brought in, one Reading, and then another, and ſome Petitions for making of Savings: There is one Rank of People that were dead, a ſecond Rank, which as you were told from the Bar, were the King's Judges; ſome of which, it is true, were Tryed by the Law, but how? Not by the Direction of the Parliament; it was before they came into the Hands of the Parliament, and the Parliament takes notice that they had been Tryed. There was another ſort that was never Tryed, but abſented, and

though

though they might have come into the Hands of the Law, and been Out-lawed; the Parliament took Cognizance of them, and Attainted them of Treaſon. Sir, I do take notice, that there was a fourth ſort of People Attainted at that time; (for if we were confined to the Rules of *Weſtminſter-Hall*, no doubt we could not give a leſſer Judgment than that for Treaſon.) There was the Lord *Mounſon*, Sir *John Danvers*, and others, and the Statute recites that they were concerned in the Murther of the King, yet in regard ſo many had actually ſuffered, they did not give them the Judgment of Treaſon, but to forfeit their Eſtates, *&c.*

This is to ſhew you the Juriſdiction the Parliament have over Offences, and how they can alleviate the Puniſhment according to the Circumſtances as they appear before them; therefore I think this is a plain Proof that we have a Juriſdiction to go on with the Bill, and at the ſame time, I ſay this, I would put it out of the Caſe, whether the Priſoner be a little Man or a great Man, that is not in Judgment before us; and I would put it out of the Caſe, what a good thing his Diſcovery would be; I do not think that a good Argument, neither do I think it any Argument if this Man eſcape, what Danger we ſhall be in? But I do give my Judgment from the Argument of his Guilt, and our Juriſdiction.

Mr. Pelham. Sir, the Learned Gentleman that ſpake laſt, ſeemed ſo very clear in his Opinion when he began to ſpeak, that I was in hopes he would have given me and every body ſatisfaction in this great Point, eſpecially when he began with *Magna Charta*, which ſays, that every Man ſhall be Tryed by his Peers, or by the Law of the Land; I do take it to be part of the Law of the Land, That no Man ſhould be condemned for Treaſon without two Witneſſes; but after that he did lay his Finger upon the Sore, he told you the great Objection was, That the Courts of *Weſtminſter-Hall* are ſo governed and tied

down, that they can't paſs any Sentence for Treaſon, but upon two Witneſſes; and he told you, we ought not to be tied ſo; indeed he did ſay we were not tied ſo: But I own to you, he did not give me any ſatisfactory Reaſon why we ſhould not be tied ſo. 'Tis ſaid, we are not tied, and 'tis impoſſible we ſhould, for no Act can tie the Legiſlative Power; and ſeveral Gentlemen have ſaid, That though there are ſeveral Statutes that declare there ſhall be two Witneſſes in caſes of Treaſon, yet they do ſay, That in caſe of Attainder by Parliament, one Witneſs may be ſufficient. Why may it not be thought that theſe Acts extend to the Legiſlature, as well as the Statute of *Edw.* 3. by which it is preſumed, that the Parliament may proceed upon one Witneſs? And I take it, that there being no ſuch hint, 'tis a Preſumption that the *Lex terræ* does crave an Obſervation of it by the Legiſlative Power.

I did preſume Yeſterday to tell you, That Mr. *Algernoon Sidney* did ſtand upon it as his Natural Right, that they could not proceed againſt him, there being but one Witneſs; I did not bring his Caſe as Parallel to this, or think that his Authority ſhould influence you; but he was a Man that had that Love to Liberty, and the Good of his Country, that he would not have ſaid ſo, even to ſave his Life, if he had thought it inconſiſtent with either of them: But I have looked upon his Trial ſince, and there he does declare, That the being Condemned by two Witneſſes, is the Law of God and the Law of Man, the juſt Law that is obſerved by all Men, and in all Places. 'Tis certain he reached even by theſe Words the Power of Parliament; when I do ſay Power, I do not mean, but that when ſuch a Law is paſſed, all are bound by it; but in ſome ſenſe we may ſay you cannot do what is not juſt for you to do: You can do but what is juſt and ſuitable to the Truſt repoſed in you.

The Gentleman ſays, he thinks it a ſtrange Opinion of him that ſaid he had rather be Try'd by a Jury,

Jury, than the Houſe of Commons; indeed if he could be ſure of ſuch a Houſe of Commons as this, he might retract what he had ſaid: But I have ſeen that done in the Houſe of Commons, which hath not made me extreamly fond of that Tryal. I have ſate here when ſix or ſeven Noblemen have been declared Enemies to the Kingdom without any Evidence at all, and the Reaſon was ſomewhat like what 'tis now. The Power of Parliaments was brought in as an Argument then, and it was ſaid, it was only in Order to an Impeachment, but no Impeachment followed, yet theſe Noblemen went with that Brand in their Foreheads, and if any Diſturbance had been, they had been expoſed to the Fury of the People: And though we are ſure of this Houſe of Commons, and may be of all in this Reign, yet I know not how Facts may ariſe, and what Parliaments we may have, and upon that account I am very unwilling a Precedent ſhould be made, at leaſt contrary to the uſage in all manner of Courts whatſoever.

Sir Tho. Littleton. Sir, I ſhall not trouble you long in this Debate, that hath taken up ſo much of your time already, in the conſideration of ſome Matters we have been upon; though I did think your time not very regularly ſpent, till this Occaſion offered it ſelf: I hope therefore now it will take up the leſs of your Time. I ſee the great Matter that was inſiſted on before, is inſiſted upon ſtill; and I do think we may ſay it among our ſelves, though we would not let the Counſel, that we are tied up in this Caſe by the Rules of *Weſtminſter-Hall.* But I believe if that was the Caſe, and the Queſtion was no otherwiſe, than whether or no we are tied up by the Rules of *Weſtminſter-Hall*, it would receive a Determination that we are not bound up to thoſe Rules.

But I will take leave to tell you what I think is proper for us to ground our Judgment on. I think the great Reaſon, even of thoſe that are againſt the Precedent, why they did admit Sir *John Fenwick* to have

Counſel, and to examine Witneſſes, if he had any, and to croſs examine the Witneſſes, and why they were willing to hear Evidence on both ſides, in the Nature of a Tryal, the great Reaſon was, becauſe that in a Caſe of this great Conſequence, they would have the beſt Information they could obtain. Why did they deſire to be informed, but that afterwards they would lay their Hands upon their Hearts, and give their Judgment upon their private Opinion, Whether he was Guilty or no? They ſay, We are not to give our Judgment upon our private Opinion, I always will. (It was not long ago we were not to have our Religion upon our private Opinion neither.) And when I am ſatisfied in that, I will rely upon it: Whether this be ſtrictly Legal Evidence, I do not lay ſo much weight upon it, as whether it hath ſatisfied my Conſcience; and I believe there is not a Man in this Houſe but is ſo, (upon what he hath heard) and doth believe that Sir *John Fenwick* is Guilty; and if we believe he is Guilty, I would be glad to know by what Rules in the World any Man can give his Vote againſt this Bill, being of that Belief. And I tell you, why I think every Man believes ſo; becauſe every Man in the Kingdom that hath not heard ſo much as we have here, does believe him to be ſo, and I can't think that their Repreſentatives only ſhould be of another Opinion.

What Evidence have you had? You have had Captain *Porter*'s Evidence, and that would be good even in the Inferiour Courts; and beſides that, you have the Evidence of what *Goodman* did ſwear before the Grand-Jury. You have heard what he did ſwear, and the Grand-Jury did believe him. You have heard likewiſe what he did ſwear in another Cauſe to the Petit-Jury, and they believed him, and convicted the Perſon upon it. And though this be not Legal Proof, ſtrictly ſpeaking, will any Body ſay that I have Reaſon to disbelieve this Man, and think he hath ſworn falſe?

Ay,

Ay, but here is but one Witneſs, Gentlemen tell you. I will put you a Caſe where I believe this Houſe would Attaint a Man without any Witneſs. Suppoſe two Perſons had ſeen Sir *John Fenwick* kill the King, (I believe we ſhould not have pulled him in pieces in a barbarous manner, but he would have had a Tryal;) and ſuppoſe before his Tryal the Witneſſes had been conveyed away, if before that they had ſworn this to a Grand-Jury, and they had found the Bill, I believe this Houſe would have Attainted him for it.

Sir, I do not think that we ſhould ſtand upon theſe little Niceties, nor be bound by the little formal Proceedings of other Courts, when the Government is at Stake. We are ſent hither to take care that the Publick Safety do not ſuffer any Miſchief from the Enemies of it: We have had Plot upon Plot, and I have heard ſo much ſaid on behalf of the *Lancaſhire* Plot without Doors, that I wiſh we do not get an ill Name upon our ſelves before we have done. We have this Power to exert upon extraordinary Occaſions, and here is a Man that hath endeavoured to ſubvert the Government, and Well-being of them that ſent you hither. I hope you will uſe it now; and if they knew who were not of that Opinion, I believe thoſe that ſent them, would hardly ſend them any more.

Mr. J. Howe. Sir, as to what is ſaid, That if it were known how we gave our Opinions, who are againſt this Bill, the People would not chuſe us again. I am not afraid of that, I have been told ſo often, and yet I find the People I live amongſt, uſe me better and better every day; and I believe, Sir, they will deſire to uſe me, when they will lay other Men aſide. I muſt in ſome meaſure ſupport what was ſeemed to be reflected on, ſpoke by an Honourable Gentleman, in that he ſaid, he had rather be Tryed by Twelve, than by Four Hundred. I am of his Opinion, and this is my Reaſon for it; I have my Lawful Challenge in a Tryal by a Jury, and if there

be any on the Pannel I have offended, I can except againſt them, but that can't be done in any Caſe here, if it might, I ſuppoſe Sir *John Fenwick* would deſire thoſe he has named in his Paper, might not be Judges whether that Paper were true, and he to be Attainted for delivering it to the King. But Gentlemen put the ſtreſs of their Argument upon that which no body denies, and prove it handſomly, and well they may; for it is ſelf-evident, the Power of Parliament they inſiſt on, and no body pretends but we have a Power to do what we pleaſe: But I muſt ſay of that Power, what *Bracton* ſays of the King's Power, *Hoc tantum non poteſt facere, quod non poteſt juſte facere.* And 'tis a ſtrange Reaſon to urge, that we ſhould do a thing of this Nature, becauſe we have a Power to do it. It is ſaid, we are not tyed up to the Rules of *Weſtminſter-Hall*; we are not ſo: But I beg leave to tell them, that what is Reaſon and Juſtice in *Weſtminſter-Hall*, is ſo every where: And I do take theſe particular Points we ſpeak of, to be grounded upon Reaſon and Juſtice, and ſo far we are as much obliged to purſue them as they in *Weſtminſter-Hall.*

Two Witneſſes are required in Caſes of High Treaſon, by our Law, that the People of *England* might have all poſſible means of defending their Lives againſt unjuſt and malicious Proſecutions: And this was ever thought conformable to the Laws of God, and the Law of Reaſon.

But truly, Sir, we are going a little further; the Gentleman before told you, there was no need of two Witneſſes, one would ſerve; but now we are told, there needs never a one at all; for I do ſay, if every Gentleman here is to be guided by his private Opinion, and not by Proof, we need not have ſpent all this Time: I ſuppoſe every one of us did conceive in his private Opinion ſome Judgment of the Guilt of Sir *John Fenwick*, upon the firſt News of his being in the Proclamation, from the Character of the Man, as well as other Circumſtances which

at

at that time might occur. Now, if there be no certain Rule by which we are here obliged to guide our ſelves in Matters of this Nature, why might we not have given Judgment on him upon our private Opinions immediately? How does it become more Lawful, or more Reaſonable by what we have heard at the Bar, if it be juſtifiable to Condemn, becauſe we barely think him Guilty, few of us have, I dare ſay, changed our Thoughts as to that part. But if, as I ſtedfaſtly believe, no Man ought to ſuffer, whoſe Guilt is not proved (which word admits of no degrees of Compariſon) I think that's no more performed by the Counſel at the Bar, than 'twas by him that drew the Proclamation, and as fit for us to determine, by the one as by the other. But 'tis ſaid, the Bill of Treaſon was intended only to Limit *Weſtminſter-Hall*, and that one may truſt ſuch Power with ones ſelf as may not be fit to be repoſed in a Servant. Truly if there were a neceſſity, that either I, or my Servant, muſt commit a very great Injuſtice, I had much rather 'twere done by my Servant, than my ſelf; and I ſhould not think it an Advantage I ought to value, to be left at Liberty to commit a baſe or wicked Action, which my Servants were reſtrained from. We have indeed taken care, that the Subject may not be oppreſs'd by Arbitrary and Unjuſt Methods below, but if we give this Example, we do, I think, little leſs than introduce the ſame into this Houſe, to be practiced here as often as Ill Miniſters, and Corrupt Members may hereafter think fit, to the utter Ruine of our Poſterity, who may thereby upon all Occaſions be deprived of the benefit of that Bill of Treaſons, or any other Law whatſoever, even in that great Point, in which all Liberty and Property is concluded, the Right to their Lives. It is therefore much better, that every hainous Fault or Miſtake, be committed in *Weſtminſter-Hall* many Years together, than once within theſe Walls. Judges can only break, or offend againſt the Law, but by ſo doing, though they

they may injure many particular Men, do no more prejudice Original Right, than a private Man that Murders his Neighbour, and are equally liable to Puniſhment in their ſeveral Stations. But this Houſe hath no Superiour Power, ſo that what is here done in this Nature, becomes a Law; wherefore a Parliament only, as it hath been often obſerved, can make this Nation unhappy, becauſe a Parliament only can Eſtabliſh Arbitrary Power and Miſery by Law.

As to the Evidence, Sir, ſince every body hath ſpoke to it, for my part, I muſt declare to you, That the more I have heard of this Tryal, the greater my Doubts have been concerning what theſe Witneſſes pretend to know of Sir *John Fenwick*'s Guilt. I have heard Captain *Porter* give his Evidence, but that is no ſufficient Proof to me. I have heard what Evidence *Goodman* did give to the Grand-Jury: But whether they did ask ſuch Queſtions, as I ſhould have done, or did confront him with other Evidence, I can't tell. Therefore though the Grand-Jury was convinced by it, it is no Reaſon to convince us; becauſe 'tis poſſible we might not have been convinced by the ſame Evidence. But to go further, there is very great Reaſon to believe, that *Goodman* was not then at this Place, and that not one word he ſays is true. I am credibly informed, that at *Cook*'s Tryal, there were three poſitive Witneſſes as could be, that he was not at the Place when he ſwore he was. And I obſerve a little failure in Capt. *Porter*'s Evidence in that Point; for I do not think it proved by Captain *Porter*, that *Goodman* was by when this Diſcourſe was; he ſays, he ſpake of this Thing at Mrs. *Mountjoy*'s, and Dined there.

Members. No, no: It was at the *King's-Head.*

Mr. F. Howe. Well, there was but one Place where it was. Now whether Captain *Porter* heard them talk of it before *Goodman* came in, or whether *Goodman* was preſent at that Diſcourſe, he having been there but the latter part of the Time, (when it

ſeems

ſeems to me they ſhould have given over the Talk of ſuch Buſineſs, they having been ſo long together before) is not very clearly made out. In the Caſe of my Lord *Delamere*, there was one poſitive Witneſs, and a Circumſtantial Evidence, and yet that was not thought a convincing Argument by the Lords to find him guilty, and I hope no Conſideration will oblige us to do that, which I am ſure we ſhould have blamed them for doing.

The Conſequence of this, Gentlemen ſay, they do not fear. I believe if Sir *John Fenwick* had been told when he was Major-General of King *James*'s Army, that I ſhould come here to ſit upon his Life, he would have laughed at it, and thought it as impoſſible as Men in great Poſts now may think the like Fate ever to befal them; but the contrary has happen'd, and I have ſeen Parties perſecute one another with ſuch Violence, that at one time or another every body hath been in Danger of a Proceeding of this ſort againſt them, which ſurmounts all we can think of, extends beyond all Pardons, and will reach beyond the Act of Indemnity. God knows who may be ſerved ſo, notwithſtanding all the Acts of Indemnity. Sir, there is one thing that is ſaid further, which the Gentleman at the Bar concluded with as a ſubſtantial Argument, That we do not aim at Sir *John Fenwick*'s Blood, (God forbid we ſhould) but at his Confeſſion: You here read the Bill once, and twice, will commit and paſs the Bill, (Sir *John Fenwick* not confeſſing) and ſtill this is not to aim at his Blood; perhaps this Man knows no more of this Matter, yet is he as it were racked even to Death from Reading to Reading, becauſe he does not confeſs, and at laſt he comes to be Hanged, Drawn, and Quartered, inſtead of High Treaſon, for not confeſſing it.

This I take to be the moſt dangerous part of all the Arguments that have been urged; for this I muſt tell you, That according to my private Opinion, I do believe that Sir *John Fenwick* does know of no more

Perſons

Perſons concerned, (nor does he pretend he knows all that he ſays:) He tells you, He hath not been a Man that hath kept Company with Great Men. I have heard he hath generally converſed with, and relieved the poor *Jacobite* Officers: There is Five People, as I take it, he hath told you he did converſe with; I would fain know in what Plot any Man converſes with above Five of the Plotters. There may be a Plot that may be moſt dangerous, and yet a Perſon that knows of this Plot, may not know above two or three others that are concerned in it. But the great Argument is, Take care of your Government. In the firſt place, they muſt ſuppoſe the Safety of the Government depends upon his Execution; Or why do they uſe it as an Argument? But how does it appear the Government would be in danger by not Paſſing this Bill? Do you want Examples of Puniſhment to deter Men? No; you have had lawful Proof againſt Four or Five Perſons, and they have been executed. Here are Examples made, that no body for the future may preſume to conſpire together, and not to be executed? What is the Reaſon of this Bill then? Why, there is a Plot going on. Sir *John Fenwick* hath been impriſoned theſe Six Months and more, will you hang him becauſe there is a Plot now going on? What Conſequence is that, do you think, that he knows any thing of it? It may have been ſtarted ſince his Confinement; ſo that to what is preſſed of his Confeſſion, I know no one thing would be gained by it that could be uſeful to the Government. Will you then proceed to a Bill of Attainder, unleſs the Matter be of the greateſt Conſequence? The Preamble of the Bill for Attainting the Duke of *Monmouth*, gave a ſubſtantial Reaſon for it, That he was in Arms, and could not be brought to Juſtice. That implied, that if he could have been brought to Juſtice, they would not have attainted him. For my own part, could I approve this way of proceeding, which I take to be both unjuſt

juſt and dangerous, my private Opinion ſhall never guide me in ſuch a caſe; 'tis not the ſame thing with that my worthy Countryman put in Matter of Religion; my private Opinion does not affect other Perſons: If I miſtake in that, I only ſuffer, tho' it be ſome Juſtification, being the Rule appointed by God for us to go by. But where private Opinion may be a Pretence to exerciſe private Malice, Revenge, Avarice, and Ambition, to the deſtruction of others, 'tis no way fit Mankind ſhould be mutually ſubjected to the one, who are ſo much enclin'd to the other. Law has therefore been appointed for the Common Safety of all our Lives, Liberties, and Eſtates, a certain Rule by which we ever thought we held 'em, and without which we ought not to loſe 'em; if that Rampart be torn down, and the Arbitrary Power of Private Opinion eſtabliſhed in its room, be that plac'd where it will, 'tis a greater Blow to our Conſtitution than any we have hitherto been threatned with: It is not, I fear, in my power to reſtrain it, but I think it yet better to ſuffer by it than conſent to it.

Mr. Norris. This is a very Solemn Debate, and 'tis upon a very Solemn Occaſion. 'Tis a Caſe of Blood; 'tis a Caſe that in my Life-time, I thank God, I never had to do with yet; and in this Matter wherein I am now to be a Judge, I will uſe as much Caution as any Gentleman within theſe Walls.

I am ſo conſcious of my own Inability in what I have to ſay, that I can't expect to Convince any body; but what I ſay, is to diſcharge my own Duty, and ſatisfie my Conſcience in that.

I doubt not, but every Gentleman conſiders the Station that he is in, and the Truſt repoſed in him by thoſe that ſent him hither: We are entruſted with the Lives, Liberties, and Properties of every Man in *England*; and we are anſwerable for them to thoſe that ſent us hither, to our Poſterity, and to our ſelves.

In

In this Matter, many things of great Weight and Importance are before you; here is the Life of a Man, the Preſervation of the King and Government, and the Power of Parliament to be conſidered. Sir, as I ſhall be Cautious of taking away the Life of a Man, ſo I ſhall be Careful of the Preſervation of the King and Government, and the Power of Parliaments; and though I do not think it requiſite, nor never will give my Conſent to Support the Government, or Honour of this Houſe, at the Expence of Innocent Blood; ſo I ſhall not be afraid of giving my Opinion in this Matter to bring a Criminal to Puniſhment, who, beſides the Treaſon he hath committed, hath Crimes of a Nature almoſt equal to Treaſon; and for which, becauſe he hath evaded the Cognizance of *Weſtminſter-Hall*, he is now brought before you; and there are ſeveral Inſtances, where this Houſe hath taken notice of Offences of a leſs Nature, and for a leſs Reaſon than this is that is now brought before you.

To Quote Precedents, is a little dry Subject; but however, I will Inſtance in one, that (I think) does Aſſert the Power of Parliaments in this Caſe, which has not been mentioned yet; and that was (as I remember) in the 3 *Rich.* 2. of an Agent that came from *Genoua*, who was (by a misfortune) killed upon a Quarrel that happened in the Streets. He that killed him was brought to his Tryal, (it could not be brought within the Statute of 25 *Ed.* 3.) and it was found only *ſe defendendo*; but he being a Publick Miniſter, it was thought fit that the Nation ſhould take more notice of it; and he was Attainted afterwards by Parliament, and there is a Record of it. They did not think fit to make a General Law, but they made an Example of the Man that committed this Fact

A great many Gentlemen have ſuppoſed this, and ſuppoſed that, and what ought not to be ſuppoſed; but I will make an eaſie Suppoſition: I will ſuppoſe

that

that we are the Commons of *England* in Parliament Aſſembled, and if ſo, Sir, we have a Diſcretionary Power to do whatſoever we ſee is for the good of the Kingdom; and if we are to be circumſcribed by the Rules of *Weſtminſter-Hall*, and are to do nothing but what they could do, to what purpoſe do we ſit here? If we are intruſted with this Power, and may Exert it, I think here is a fit occaſion for you to Exert this Authority.

Sir, give me leave to take notice, That the ſtrain of Argument that was uſed ſome Years ago, is very much altered by the ſame Gentlemen; (I will mention it) I think it was in 78, when the Bill of Excluſion was brought within theſe Walls, the Argument ran then (for I have ſeen them in Print.) Thoſe that were againſt that Bill, What will you do? Say they, Will you do this thing? Paſs a Judgment againſt a Man without Hearing of him? Hath he been brought to your Bar, to Anſwer what you have to ſay againſt him? How do you underſtand that he is Guilty of the Crimes you Accuſe him of? And they did uſe thoſe Arguments againſt them that were for Diſinheriting the Duke of *York*; but the Anſwer then was, Do you Diſpute the Power of Parliaments? Is there not a Diſcretionary Power in the Parliament? I do take notice, That thoſe Gentlemen that uſed that Argument for the Bill of Excluſion, now uſe it a quite contrary way. Sir, I think the Power of Parliaments is not to be trifled with.

It hath been urged and ſaid, a little while ago by a Gentleman, That he does not believe Capt. *Porter* is a good Witneſs. I will give you a good Reaſon why I do think he is a very good one, and they at the Bar think ſo too, becauſe they would have given a great Reward to have taken him off; and for the ſame Reaſon, I believe *Goodman* to be a good Witneſs too: For Sir *John Fenwick* was ſatisfied, that *Goodman* did know how far he was concerned, and he hath been prevailed with to be out of the way.

Sir,

Sir, here are a great many Circumſtances that agree ſo well together, That (I think) no Perſon can doubt of Sir *John Fenwick*'s Guilt; and (I think) 'tis in this Caſe in the Body Politick, like the Body Natural, when a Man is almoſt paſt the Cure of Phyſicians; when a Man hath a Gangrene, a Rotten Member, which the Phyſicians by the ordinary means can't Cure, if the College of Phyſicians themſelves, in that Caſe were conſulted, they would ſay, *Immedicabile Vulnus enſè recidendum eſt.*

I am of Opinion, That the Legiſlative hath this Power, and that this is a proper Occaſion to Exert it; and to compare ſmall things with great, 'tis like Thunder and Vengeance in the Hands of Providence, that ought not to be uſed, but upon Extraordinary Occaſions; and then it ought not to fail, for a Man trifles and deſpiſes that Power that is not effectually able to Exert it ſelf; and if the Sword of Juſtice be drawn, if Men find it ruſty, and will not cut, they will have a mean Opinion of your Power for the future.

Gentlemen are afraid of Precedents in this Caſe; for that Reaſon I am for Committing this Bill, becauſe I would make this a Precedent; and I will tell you why: Becauſe it may happen in future Ages, that Miniſters of State, and Perſons concerned in the Government, may be faulty (I think I may ſuppoſe that) and as the Law ſtands now, he is but a bungling Politician, that can't ruine the Government, and yet not come within your Bill of Treaſon to be Hanged for it. And therefore for the keeping an Awe upon Miniſters of State, and becauſe I would have this Houſe always have it in their Power to Puniſh future Offenders, as they ſhall ſee cauſe, as well as this unfortunate Gentleman at the Bar. I am for Committing this Bill.

Mr. Finch. Sir, the Queſtion now before you, ariſes upon a Caſe wherein you have a Man Accuſed of High Treaſon, and for that there is but one Witneſs, which

which by the Rules of *Weſtminſter-Hall*, is confeſſed by every Gentleman, to be not Legal Evidence.

I remember the other day, when this Evidence was offered, and an Objection made to it, the Anſwer was, That we ought to hear it (though in *Weſtminſter-Hall* they could not do it) 'cauſe we ſit here as Judges, and we can diſtinguiſh what is Legal Evidence, and what is not Legal Evidence, and can give its juſt weight to every part of it: I do obſerve now, in this Debate, ſome part of the Evidence, which no Man can ſay could have been given according to the Rules of Law, if inſiſted upon, and weight laid upon it.

And here they have taken into Conſideration the Power of Parliaments, and the Method of Parliaments has been inſiſted on; as to the Power of Parliament, Whether the Parliament can do it? And whether if the Parliament pleaſes to do it, they are tyed up (as Gentlemen are pleaſed to expreſs it) to the Rules of *Weſtminſter-Hall*? That the Parliament can do it, 'tis a hard matter to gain-ſay, That any thing is out of the reach of the Supream Power of a Nation; The Legiſlative Authority can do every thing: Yet though Gentlemen have ſaid this, and others have obſerved, That there wanted no Authority to prove this being Self-Evident; yet give me leave to inſtance in ſome particular Caſes, with the Authority of the Judges upon them, where the Parliament have proceeded according to the Rules of *Weſtminſter-Hall*.

We Read in *H. 8.* Time, That the Lord *Cromwel*, Earl of *Eſſex*, was Attainted in Parliament; and Hiſtory tells us, That he was Attainted by a Law of his own making. Now, ſays my Lord *Coke*, That ſeems ſtrange; but enquiring of an Ancient Perſon that lived in thoſe Days, he told him the meaning of it; That Lord had conſulted with the Judges, Whether or no, if a Man was Attainted by Parliament, and was not brought to be Heard, ſuch Attainder would be good in Law? The Judges ſtartled at the Queſtion, but told him they could give no other Anſwer than this; *Truly, if ſuch*

Attainder be made, we know no Law to find fault with it, for 'tis done by the Legiſlative Authority. It fell out, That the Inſtance of Condemning a Perſon in Parliament (not according to the Rules in *Weſtminſter-Hall*) fell out to be that Noble-Man's own Caſe; for he himſelf was ſo Attainted immediately after.

Give me leave to Inſtance in another kind of Authority; the Authority of Parliament touching theſe Attainders, and what has been the Conſequence of them. If you will look into the Records of *Rich.* 2. Time. I do not mean the Records that have been quoted, nor the Caſe of *John Imperial*, for killing the *Genoua* Embaſſador, which was declared Treaſon in Parliament, Ten Years after the Man had been Tryed in *Weſtminſter-Hall* for it; but I mean the 11 *Rich.* 2. how many were Attainted by the Proceedings of thoſe Times? I do not mean by Acts of Parliament, but thoſe Attainders were in an Extraordinary manner, not according to the Rules of *Weſtminſter-Hall*: And 21 *Rich.* 2. the whole Parliament and its whole Proceedings were Reverſed, and the Parliament Annulled: In that Year were the Proſecutors of the 11th. Year themſelves Attainted: And 21 *Rich.* 2. the Act that Repealed that Parliament, Repealed the Pardon too. But in Order to come to the Attainder of thoſe Perſons, That being done, was not enough; for the Lord *Arundel* had a Pardon the 17 of *Rich.* 2. upon that they made a Law to Repeal his Pardon by Patent, that they might come to the Attainder of that Lord; and that Lord was Attainted by Act of Parliament: But I muſt obſerve one thing a little further, That that very Parliament, that doubtleſs knew their own Power well enough, and that their Attainders were firm, being made by the Legiſlative Power; yet they had a little Jealouſie themſelves of their Proceedings; for they paſſed an Act to make it Capital to go about to Reverſe any of thoſe Laws, and another Act, that all the Lords and Biſhops ſhould be Sworn. Now ſee what fell out after, *Rich.* 2. was

Depoſed,

Depoſed, for Conſenting to thoſe Laws; *Henry* the Fourth, in the Firſt Year of his Reign, Abrogated the whole Parliament, and Repealed all thoſe Laws: Theſe Turns have been upon theſe Extraordinary Proceedings of Parliaments.

Give me leave to give you another Inſtance, and that in another Caſe, as odious as poſſible could be. In the Murther of *Edw.* 2. there was *Roger Mortimer* Attainted in the firſt Year of *Edw.* 3. and the Record ſays, *That it was Notorious to them all:* And what then? They adjudged him to be Attainted in Parliament: When Time had a little worn off that Extraordinary Zeal, (which truly was commendable, tho' it had tranſported them a little too far beyond the Rules of Juſtice;) and they came to conſider what Precedent they had made for Poſterity, it had another face; for in 28 *Edw.* 3. was that Attainder Reverſed, becauſe he was not brought to Anſwer, as he ought to have been. There was alſo an Act for Attainting the Earl of *Arundel*, which in the ſame 28 *Edw.* 3. was Reverſed, becauſe he was not brought to Judgment by due Proceſs of Law.

But now we are told, we are not tied here to the Rules of *Weſtminſter-Hall*; Gentlemen do not enough diſtinguiſh in this Matter; the Forms of *Weſtminſter-Hall*, ſay ſome; the Rules, ſay others; and others ſay there is no difference between the Form of Proceedings, and the Rules of *Weſtminſter-Hall*: But I hope no Gentlemen do think but the Parliament, though they have a Power to act as they think fit, (as Inſtances have been given) yet the Parliament it ſelf are tied by the Rules of common Juſtice. Now I would have Gentlemen that ſay we are not tied to the Rules of *Weſtminſter-Hall*, a little to conſider the Matter. Are the Rules of *Weſtminſter-Hall* no other than what are neceſſary for the Executing of Juſtice? If they are no other, How can we be ſaid to go according to Juſtice, when we go beſide thoſe Rules? I deſire them to conſider of the Conſequence of this

Proceeding; there is no Danger, I hope, of this Parliament: But if we ſhall ſay, that the Rules of *Weſtminſter-Hall* are not ſuch as are neceſſary for the Proceedings in a Courſe of Juſtice, we ſhall ſhake thoſe Barriers off our Liberty and Property, I am afraid, a little more than Gentlemen think of at preſent; and ſhall we declare they are not neceſſary, when our Anceſtors have thought them ſo, and their Wiſdom have derived them to us, and the Wiſdom of the Nation in Parliament have Eſtabliſhed theſe Rules!

I can't ſay what Conſequence may follow upon this. This Parliament can never do any thing to endanger the Lives of the People of *England*; but heretofore Parliaments have been damned with ſeveral Brands ſet upon them by ſucceeding Parliaments. As for Inſtance; One, I think, in the 38 *H.* 6. or 39. That Parliament was wholly Repealed as Packed, and paſſing Laws through Rancour and Malice, and having paſſed no Good ones. Now ſuppoſe a Parliament ſhould come, that ſhould not be ſo tender of the Liberties of the People as this; and they ſhould be ſo bold as to ſhake thoſe Laws that are made for the Rules of Juſtice, if they have ſo good a Parliament as this to guide them in it, Will not this be an Inducement to ſuch a Parliament as that, to ſhake all your Laws and Liberties? But I can't trouble you any longer, my Head will not give me leave. I am againſt the Bill, and have offered you my Reaſons.

Col. Wharton. I hope, Gentlemen in a Matter of this Moment, will have Patience to hear one another; and ſince every Gentleman is to give his Vote in this this Matter, I deſire to give my Reaſons for my Vote I am of the Opinion of another Gentleman, That we have not touched the Sore yet; But I do not think that the Rules for *Weſtminſter-Hall*, are Rules for us. The Gentleman that ſpake laſt, as he always does, made a very Florid and Elegant Speech, and brought you ſeveral Examples of Attainders that have been condemned from one Parliament to another, in ſeveral Reigns.

Reigns. But I do not wonder at that, when the Crown went from one to another. An Inſtance was given in the Caſe of the Lord *Cromwel*, which was ſpoke too from the Bar; and Sir *Tho. Powys* laid a great ſtreſs upon it, That this was condemned as a wrong Judgment, becauſe he was not heard: I believe that may be a Reaſon why many of thoſe Attainders were condemned; perhaps it might be a Cuſtom of our Anceſtors to paſs Bills of Attainder without hearing the Party: This Perſon hath been heard, and fully heard; and I believe no Perſon that hath been Attainted, hath had ſo fair a Tryal; and therefore Parliaments having condemned Bills of Attainder, becauſe the Perſons have not been heard, that will be no Reaſon why any Parliament ſhould Condemn us. A Gentleman told you, That the Law of God and Man was not to Condemn a Man, but upon two Witneſſes, but there are many Inſtances to the contrary.

It is told you, That *Porter* here before you is not a good Evidence, becauſe he is not Sworn; and that you are to go by the Rules of *Weſtminſter-Hall*. Says the Gentleman that ſpake laſt, you are to go by their Rules, but not by their Forms: I muſt confeſs there is a great difference between them two; for a Form is only the Manner or Method by which we proceed in doing of any thing; but the Rule is the Foundation we are not to Err from, but I can't agree; we are upon the ſame Rules as *Weſtminſter-Hall* is. The Rule of *Weſtminſter-Hall* is, when a Man is brought upon his Tryal, the Jury are all to be upon their Oaths; by which Oath they are to make a true Judgment according to Law: This is not the Caſe here; if I was a Jury-Man, and was to try a Man, and one Witneſs Swore againſt this Man, and no other Witneſs, though I did in my Conſcience believe him to be Guilty, yet in that Caſe my Conſcience is diſcharged, and I muſt find him not Guilty: But no Man can ſay this is the Caſe here.

What are we now a doing? Here is a Bill to Attaint Sir *John Fenwick* of High-Treaſon, if I reject the Bill, I do declare him not Guilty; and if I do think him Guilty, I do thereby declare againſt my own Judgment; for my Judgment here, is not bound up as a Man's Judgment upon a Jury; for his Judgment is bound up to Proof, according to Law; and my Judgment is bound up by my own Belief: This is the Proof I muſt go by; and I think every Man is bound in Juſtice and Duty to his Country as he believes Sir *John Fenwick* to be Guilty, to be for the Commitment of this Bill; and till any Gentleman will convince me, that this is not a Rule I am to go by, I muſt continue in this Opinion.

Mr. Boyle. The Diſorder that worthy Gentleman was in, makes me the more concerned for fear of falling into it my ſelf.

I hope in this Debate, Gentlemen will be very cautious of uſing it as an Argument, what Acceptation our Votes ſhall have without Doors, and with thoſe we Repreſent, when we are to give Judgment, as far as in us lies, of the Life and Death of a Man; and therefore I muſt obſerve, that the eagerneſs that is juſtifiable upon Impeachments, may not look ſo well now we are Judges upon a Bill of Attainder. You have gone over the whole Courſe of the Evidence, and I believe that this Debate will ſhew you pretty plainly, what is to be the Fate of this Bill, for I believe all the Arguments will be now uſed that can be. As to what hath been ſaid of extorting a Confeſſion, I take it to be quite out of the Caſe.

I am ſorry to be ingaged one way or another, I would not, if I could help it, out of the Houſe, be upon a Jury of Life and Death; yet in that Caſe, I ſhould know the Law, or be told it by the Judges; but in this Caſe, we are both Jury-Men, and Judges, and know not what Rules we are to go by; but ſet up a Court of Equity which hath no bounds, but our own Conſciences.

As

As to Sir *John Fenwick*, I know him not; as to his Cauſe, I am ſure, I am againſt it; but how far I think him Guilty or not, I think is not the ſingle point to be conſidered; I muſt confeſs, there have been ſeveral People accuſed of this Conſpiracy, and have been named by the Evidence at the Tryals; and I believe they are much alike Guilty, being upon the ſame Evidence; but as to all that hath been opened before you, and proved, it can amount to no more than this; there is but one Evidence, which by the Law would be admitted to be a good Evidence to convict him in another place; and therefore I do agree with the Gentleman that ſpake under the Gallery, that this is a very Extraordinary Caſe; for one Witneſs is not ſufficient at Law to convict him, and the Law would be very different here. If I am to judge according to my own Opinion, and not by the Rules preſcribed by the Law; but though this Proceeding is not ſtrictly according to the Law of the Land, yet if it was ſuch an extraordinary Caſe that required you to diſpenſe with thoſe Forms, and come to this extraordinary Manner of Proceeding; I think, for my own part, it might be ſupported by the neceſſity of it, for 'tis impoſſible that it ſhould be otherwiſe in Practice, That when the Government is at Stake, and nothing will preſerve it, but the breaking through the ſettled Forms; but the Government will break through them, and whatever Rule you preſcribe, it will always happen ſo.

There is a very extraordinary Caſe, and that was in the Conſpiracy of the State of *Venice*, above a Hundred Years ago, I think, ſet on foot by the *Spaniards*; then the State, to get the whole Matter out, promiſed a Pardon to as many as were concerned in it; and after they had promiſed it, and treated with them about it, they thought it neceſſary, for the Preſervation of the Whole, to break their Faith, and they were all put to Death. This was upon Point of Preſervation of the Government.

But, Sir, as to Precedents, give me leave to ſay, I do not give that Authority to them, unleſs I knew all the Springs, and ſecret Hiſtory, and Tranſactions, that were their Guide in making thoſe Precedents; and as to Precedents that have been quoted, when the Parliament have declared what was Treaſon, and what was not Treaſon, or have declared conſtructive Treaſon, they may be grounded upon the Statute of 25 *Edw* 3. But I think there is no Statute upon which they can ground the Condemnation of a Man upon one Witneſs.

In the Caſe of my Lord *Strafford*, upon Conſtructive Treaſons, it was there ſaid, That it was a Fire that had lain hid for 240 Years; and that it never brake out before, but to conſume him and his Poſterity. It was anſwered by *Pym*, If that was the Caſe, it was not for want of Law to juſtifie ſuch a Proceedding, but all that time had not produced ſuch an Offender.

I do not doubt, but if any one will conſider the late Conſpiracy, and if that was the Queſtion, but it was as Extraordinary as any thing can happen: For it was to ſubject the Country to a Foreign Power, which is very extraordinary, and ſeveral Perſons were concerned in it: But there is one extraordinary part which I do not remember this Gentleman is accuſed of, and that is, the Aſſaſſination, Treaſon it ſelf is a very extraordinary Crime; but give me leave to ſay, that extraordinary part is not alledged againſt this Gentleman, and this Bill does not ſeem to be brought in for that, wherein he is concerned in common with ſome others, but for the ſubſequent Matter alledged in the Bill. This Bill is grounded, not ſo much upon that he is guilty, as a great many more are, as upon ſeveral Circumſtances which have happened to no body elſe. Give me leave to inſtance in a Caſe, now in my Head; (I beg your Pardon that I ramble, 'tis from the Awe I have upon me from this Aſſembly.) In *Cateline*'s Conſpiracy, and if that was

our

our Caſe, no doubt there would be another ſort of Argument for it. There they conſulted what to do with *Carthegus*, and the other Conſpirators; he was at the Head of an Army, which only expected his Orders to lay *Rome* in Aſhes; the Queſtion was, Whether they ſhould break the *Portian* Law; and for the ſafety of the Senate, they were put to Death before the Aſſembly roſe.

Now to come to this part of it, though Sir *John Fenwick* is a great Offender, yet I think his Caſe is not ſo Extraordinary, as to make you proceed upon this Bill. I do take his living or dying not to be of that Conſequence as this Bill of Attainder: I know not how he comes to be ſo conſiderable when in hold; for when he walked about Town, I never heard he was feared or regarded at that time.

But to come to the Allegations in your Bill, upon which you are to ground your Judgment: The firſt part is a New Conſpiracy, that is, for intending to create a Jealouſie between the King and theſe Noble Perſons: As to them, you have already paſſed a Vote in their Juſtification; and I think their Actions may juſtifie them to the World, as much as any Vote of the Houſe of Commons; but whatever that may be, I think it was a Fooliſh piece of Conſpiracy, as well as an ill one; for one, when he was in danger of being Hanged for one Plot, to venture upon another; and, I think, there was at that time two Witneſſes to bring him to his Tryal, and that is an Allegation in the Bill. And as to the Protracting of his Tryal, 'tis Natural, and ſo juſtifiable, whether Innocent or no, and what every body attempts; and no body can wonder at it, but in one Caſe or the other, it can be no ſufficient ground to Attaint him.

The next thing that is ſaid, is, that he hath been the occaſion of the withdrawing of an Evidence. Now I muſt obſerve, That is not alledged in the Bill, and is proved but by Hearſay; but ſuppoſe it was true, and alledged; if any Man concerned in Treaſon, ſhall

endeavour

endeavour by Friends or otherwiſe, to get off an Evidence, Can that amount to that which is deſigned to be puniſhed by this Bill? To High Treaſon? 'Tis the part of thoſe that are entruſted with thoſe Matters, to be in expectation of ſuch Practices. What are Goals for, but to keep them in Cuſtody? And the People employed in thoſe Buſineſſes, are to take care of it. Are we to ſupply a Defect of what ought to have been done in another place?

So that I do ſay, That a Precedent in an Extraordinary Caſe, is no Precedent to be uſed in a Little Caſe; it may be urged, but 'tis but a pretence. When you have paſſed this Bill, which is the Record, the Matter will appear no otherwiſe than are the Suggeſtions of your Bill: A Man hath aſperſed great Perſons, which is a great Fault indeed, (for he is not charged with the withdrawing of the Evidence,) therefore Attaint him upon one Evidence; I think by this Bill, you will open a Door for a Precedent of all Treaſons of the ſame Nature. Sir, there have been many Precedents mentioned, I will trouble you with none, becauſe moſt Gentlemen have read the Argument of Mr. *St. John*'s, in this Caſe: I muſt confeſs, unleſs there was that neceſſity as is pretended, which I do not ſee, I do not ſee how you can juſtifie paſſing this Bill of Attainder, either by the Law of God or Man, in any Nation allowed.

I muſt confeſs, I have no manner of concern how this Queſtion goes; what I have ſaid, is more to ſatisfie my own Judgment, than work upon other People; I am not ſatisfied, there is that neceſſity that is pretended; and therefore as my Judgment is now informed, I can't give my Vote for the Committing of this Bill.

Mr. Smith. Sir, I own my ſelf to be very unfit to ſpeak in this Argument, but ſince I am to give my Vote in a Matter of this Conſequence, I beg leave to give my Reaſons why I give my Vote, as I intend to do; I know the Matter before us, both in the Nature

Nature of the Crime and Puniſhment, as well as the Conſequence of it, requires a very deliberate Conſideration; but at the ſame time, I do take the Hazard and Danger of this Government to be a Matter of great Conſequence too.

Though there have been ſeveral Precedents inſtanced in, in Relation to Attainders; and though I have obſerved, that moſt have acknowledged, That they might be juſtified upon Extraordinary Occaſions; yet when they have aſſerted that, they have told you, they were upon a wrong Foundation, and ſo were laid aſide. Now I think it no great matter to ſay, That thoſe Attainders that were made in Rancour upon Contended Titles, were Reverſed when the Oppoſite Party got the Power: No more than if any Action, be it never ſo juſtifiable, ſhould be Reverſed when King *James* comes again, which I hope never will be. Is it any Argument, that when *H.* 4. came to the Crown, and Depoſed King *Richard*, that he Reverſed all the Attainders in his Time? There might be Reaſons might ſway with Perſons for Reverſing particular Acts of Parliament, which might be very good, or might be not ſo, there was ſuch a Change of Government at that Time; but they take notice it was made a particular Article againſt *Rich.* 2. as if when the Power was come to other Hands, they would not have Depoſed him if they had not had that Argument: Neither do I take that Argument to be of any weight; That Attainders have been Reverſed, becauſe the People have not been heard; when this Gentleman hath had as full a Hearing as ever any Perſon had upon any Bill of Attainder, or Impeachment whatſoever. And he hath had the Advantage of Counſel in this Caſe, which, as has been told you, was excepted out of the late Act of Parliament, and of the moſt able Counſel too.

'Tis ſaid, this is a matter of no great Conſequence, becauſe it concerns Sir *John Fenwick*'s Life ſingly; and he is not thought to be ſo conſiderable, as by his Eſcape

to

to bring the Publick in danger. Now, it hath been always one Principal I have laid down, That if a Plot be diſcovered, and not throughly proſecuted, it ſtrengthens and grows upon you, and ten to one if it does not Subvert the Government.

Now, God be thanked, that we have prevented the Deſign upon the King's Perſon, and ſeveral have been puniſhed for it; but I think we are not gone to the bottom of it, and that we ought to provide againſt it in a much other manner. Can any one think that Sir *William Perkins*, or Sir *John Friend*, and the reſt that are diſcovered, were the only Perſons concerned in this Conſpiracy? I take it, that there have been much greater Men in it; and when I ſee ſuch a ſtruggle both to get People out of Goal, and ſend People out of the Way, and all Arts uſed that can be; I muſt ſuppoſe, when ſuch Extraordinary Courſes are taken, that there is ſomething Extraordinary ſtill to be done; and I would not have Men by Bribing of Witneſſes think to Secure themſelves: It hath been uſed as an Argument to leſſen the Matter, That this was a little after the Act of Indemnity, Can any thing aggravate a thing more? Sir, theſe very Arguments turn againſt them.

We are told here, that we muſt not Conſult our own private Judgments in this Matter; and we are told at the ſame time, if there were two Witneſſes that we did not believe, we muſt not find him Guilty. We are told of a Judge, that though he knew a Perſon to be not Guilty, yet it was a commendable Action in him that he Condemned the Man; but that hath been very well anſwered already, and I ſhall not meddle with it further; only this I will ſay, That I never will in any Caſe be a Jury-Man or a Judge, where the Convictions of my own Conſcience ſhall not govern me, but an Evidence, that I do not believe. And becauſe that Story was told you, I will tell you another, that I think more commendable, And that was, a Man was Tryed for a Murther, and there

was

was poſitive Evidence againſt him; the Jury went out, and ſtaid a great while: There was Eleven againſt One for finding him Guilty; but at laſt the One almoſt ſtarv'd the reſt, and they brought the Man in Not Guilty: The Judge ſent for the Gentleman, and deſired to know his Reaſon for differing with the reſt: And at laſt, upon Aſſurance that nothing ſhould be done to him, Why, ſays he, would you have me find the Man Guilty, when I was the Man that killed the Perſon, and he was Innocent?

Then, Sir, if you take the Evidence as it is; I think, firſt, here is Capt. *Porter*: I do not find any Body Excepts to him; and his Evidence hath been Approved of by ſeveral Juries, and ſeveral Perſons executed upon it; and nothing Material hath been objected againſt it. I will not ſay, That Sir *John Fenwick* hath owned a great deal of this himſelf: He hath given every Body Satisfaction, how far he ſtands Guilty in his private Opinion; but it is brought ſo far home, that there was Sir *John Fenwick*'s own Letter to Convey him abroad. Here hath been Attempts upon other Perſons; you hear what hath been done by the Soliciror. They ſay, he was not his Solicitor at that Time; but, I believe, if it be enquired into, he was his Solicitor at that Time. Here are very pregnant Circumſtances; one Gentleman ſaid, you ought not to make uſe of *Goodman*'s Evidence here; and yet he could make uſe of every thing to Diſparage him; for he could ſay, there were three Witneſſes poſitive againſt him.

Now when 'tis ſo notorious what Parties there are for King *James*; and we find Perſons Plotting in every Part of the Kingdom: When you have an open Invaſion before you, and when Deſigns are laid againſt the King's Life every day; if this be not a Time to Exert an Extraordinary Power, I ſubmit it to you

Sir Rich. Temple. Sir, I ſhall not trouble you with any thing that hath been offered to day. That which calls me up is the Danger of the Precedent you are

about

about to make, and the Arguments that have been uſed to Support it, which, I think, are more dangerous than that. I muſt confeſs, 'tis a new Doctrine to me, That the Laws that are made by the Parliament, are to be no Rule and Guide to this Houſe. Sir, the Birth-right we have, is in our Laws; and I did ever think till now, That the Laws were not only made for *Weſtminſter-Hall*, but for all the Subjects of *England*; and eſpecially, that they were to be a Rule to the Parliament that made them, till they ſhould think fit to alter them.

Here have been great Miſtakes between the Power of Parliament and the Juriſdiction of it; the Power of Parliament is to make any Law, but the Juriſdiction of Parliament is to Govern it ſelf by the Law; and this, give me leave to ſay it to you, hath been the Opinion of all your Anceſtors, and the Method they ever uſed: Shall we make a Law here in a particular Caſe againſt all the Laws of *England*? 'Tis *Ultimum remedium & peſſimum*; you may uſe it in a Caſe of abſolute Neceſſity, but otherwiſe it may be a Precedent to overturn all.

There are ſeveral things in making this Precedent, that overthrow all the Laws and Liberties of *England*. Firſt, you are paſſing Judgment upon a Man upon one Witneſs; I have heard a ſtrange Debate to Day, That there was but one Witneſs in Treaſon, before the Statute of *Edw.* 6. you know, that in Caſe of Treaſon, there was by the Common Law required two Witneſſes; for if there was but one, the Party might demand Tryal by Battle, and that was the Common Law of *England*.

There is another thing that is Extraordinary; here you are going to paſs an Act without any Tryal at all; for to ſay this is a Tryal before you the Commons, is a miſtake; you never did Aſſume a Juriſdiction of Trying any Perſon, nor can you: You may for your own Information hear what can be offered, but 'tis not a Tryal where Witneſſes are not upon

upon their Oaths. There is no manner of Power or Juriſdiction can be pretended for you to Try me; that is a ſecond Thing. All the Bills of Attainder you have had, have been in three Caſes, where the Perſons have been either Dead or Fled, or have been without the Compaſs of the Law, and could not be brought to Anſwer: And you have had ſome Bills of Attainder after Tryals had in *Weſtminſter-Hall*; but never a one of thoſe have been called Tryals, but they have been generally Reverſed; and for what? They tell you, That they have been Reverſed by one Party, and another Party: It was in the ſame King's Reign, in *Rich.* 2d's Reign; they went forward and backward, as the Court-Party or the Country-Party were uppermoſt.

There is another thing in this, that I think, of a moſt dangerous Conſequence; and that is, That you are making way, for what I know, by this Precedent, for a Rack, for ſo 'tis ſaid, this is to force a Man to be an Evidence. Why, give me leave to ſay to you, 'tis a new way not known in *England*, that you will Hang a Man unleſs he will Confeſs or give Evidence; but I think 'tis ſomething more than a Rack, for here is Hanging, Drawing, and Quartering in the Caſe; and I do not think this Proceeding will make him an Evidence with any Credit or Reputation to this Houſe; nor am I of Opinion that he can Diſcover any thing worth ſuch a Precedent.

Now give me leave to ſay one Thing as to the Juriſdiction of Parliament. It hath paſſed here for current, That the Parliament hath a Power to Declare what they will Treaſon, though ſo by no other Law; 'tis the greateſt miſtake in the World: I heard a great Debate upon this, upon my Lord *Clarendon*'s Caſe, and 'tis plain, that Statute relates only to Caſes brought from Inferiour Courts to Parliament; for it ſays, *That if any other Caſe ſuppoſed Treaſon, which is not in that Statute ſpecified, doth happen before any Juſtices, the Juſtices ſhall tarry without going to Judgment of the Treaſon,*

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till the Cauſe be ſhewed and declared before the King and his Parliament, Whether it ought to be Judged Treaſon, or other Felony; I ſpeak to the Juriſdiction the Parliament has by that Statute. 'Tis, that if the like Treaſon (for at Common Law there was a great many Treaſons) ſhould fall out, and be brought before Inferiour Courts, of which they doubted, whether they were Treaſon or no, then they ſhould be brought before the Parliament, to Judge whether they were Treaſon or Felony. But how ſhall they Judge? By the Laws in being. And who is this Judgment in? Not in the Parliament by Bill, but only in the Houſe of Lords: Much leſs is it, That you may Judge that to be Treaſon in this Houſe, that was not ſo by the Law before. So that give me leave to ſay, therefore there is no ſuch Power reſerved to the Parliament, to Declare any thing Treaſon that is not Treaſon before.

I muſt ſay, 'tis of the laſt Conſequence, that we ſhould make a Law in a particular Caſe to take away from him all the Liberty that belongs to a Subject. Some Gentlemen talk of the great Favour he hath had at this Bar; I know not what to think of it; I am ſure you allowed the King's Counſel ſuch Priviledges as I never ſee before, and that was to offer that for Evidence, that every body acknowledged was not ſo; and I do not think any body would think it a great Favour to be heard in this manner, eſpecially to things not in the Bill.

'Tis ſaid every Man muſt go according to his private Opinion, 'tis not ſaid Judgment neither, the Inſtances that have been given, are of a quite different Nature: A Man is not to give his Judgment againſt his Knowledge; I think that Judge ought rather not to have Try'd the Cauſe at all; but if we ſit here to Judge, we ſit to Judge him according to the Law of *England*, and then we muſt Judge him according to Legal Proof: Will you ſet up a Judgment that is not only not tyed to the Rules of *Weſtminſter-Hall*, but is

not

not tyed to the Laws of the Land, and Attaint a Man without a Legal Tryal, without Legal Evidence, and upon one Witneſs, when the Law ſays, you ſhall have two; and after all, ſay 'tis a reaſonable Proceeding? I know not how it came about, that the Act of Grace was paſſed, it did not riſe from this Houſe, if it hath had any ill Conſequence, let them Anſwer for it that were the Cauſe of it.

They ſay the Government is at Stake, becauſe the Plot hath not been found out to the bottom: That is not our fault, this Man hath been long enough in Cuſtody; if he hath trifled with the Government, I am ſorry he hath impoſed upon them; but if it be ſo, I think there is nothing in this Caſe of that Conſequence, as to make you make this Precedent.

Sir Will. Strickland. Mr. Speaker, I would not make uſe of any ill Precedents; and yet if the preſent Occaſion, and the Neceſſity of the Kingdom required it, I would make a Precedent. I am glad that ſeveral ill Precedents are avoided in this Caſe, and I will be bold to ſay, whether this Gentleman ſuffers or no, no Man can ſay, that he hath been harangued to Death by Counſel.

Sir, I ſhould be as tender in point of Blood as any Man; but I do think, if the Safety of the King and Kingdom is concerned, 'tis not one private Man that we muſt have that Reſpect for, as to let the Publick ſuffer by it: I do think, that upon this Occaſion there have ſo Extraordinary things happened, as have hardly happened in former Ages: Here is one who is known to have been in a Conſpiracy to bring over a *French* Power with a Popiſh Army, to deſtroy our Lives and Liberties, his Tryal has been deferred by his Equivocations and Pretences to make a great Diſcovery, which when he comes to make out, he Accuſes the beſt of your Friends, and this is only an Artifice to get time till they could get the Evidence out of the way. I think, if you do not take notice of it, and let the Legiſlature ſupply that Defect, it may be of

ill Conſequence, and may encourage any one to commit the worſt of Miſchiefs, upon hopes, that if they can get the Evidence out of the way, they ſhall go unpuniſhed.

Sir Fr. Winnirgton. I ſhall trouble you but a little while, it being late. But Gentlemen ſaying 'tis an Extraordinary Caſe, I ſhall give my Reaſons why this Bill ought not to be Committed; for every Member here now, is a Judge, and he muſt take the Blood of this Gentleman upon him in Judgment either to Condemn or Acquit him; and I muſt confeſs, I have very much admired, to hear that Doctrine preached, That every Man, as he is ſatisfied in his private Conſcience, ought to Judge this Man Guilty. I deſire to know by what Authority we ſit here? We ſit here and have a Legiſlative Authority, and 'tis by the King's Command we come together; but at this time we are Judicially Trying this Man for his Life, and therefore I humbly conceive, That we ought to proceed *Secundum allegata & probata*, and for any Man in his private Opinion, to ſay he is Guilty, he does not Act by the Commiſſion he ſits here: For to tell you of the *Lancaſhire* Plot, or that a Man ſhall not be choſen hereafter, ſeems to be Arguments to inflame, but nothing to the Queſtion.

Now, Sir, I will humbly offer to your Conſideration, and the Judgment of the Houſe, why I think we cannot Judicially Condemn this Man, for I think the Queſtion of Commitment to be the ſame as of his Life and Death

I do agree upon all the Precedents good and bad that have been cited, and doubt not but in Extraordinary Caſes, 'tis in the Legiſlative Power of the Parliament to look after the ſafety of the whole; but I ſhall offer my Reaſons why this does not come to that Caſe.

I will not now ſpeak to the Rules of *Weſtminſter-Hall*, but upon the right Reaſon of the Thing: for if it be Reaſon in *Weſtminſter-Hall*, it may be [illegible]

and that ought to overcome every thing: But whereas Gentlemen ſay you have one Witneſs; I do not apprehend you have one good Witneſs, and I will give you my Reaſon for it; for you muſt take Capt. *Porter* upon his Parol, and conſider what he ſays upon his Word; and then I do appeal to every Gentleman here, Whether ever they did know that a Bill of Attainder proceeded againſt any Man upon bare Affirmation? No; in that Caſe you have turned it into an Impeachment, if the Thing looked probable, and then you had the Witneſs upon Oath, and the Ancient Method of Bills of Attainder uſe to be firſt by Impeachment of the Perſon, and then to turn it into a Bill of Attainder.

Then ſee what is it that is inſiſted on by the King's Counſel, and recited in the Bill, *That there was a Bill of Indictment found by the Oaths of two Witneſſes*, that is, *Porter* and *Goodman*: Under favour, I think they are not to be counted as Witneſſes in the point; and I offer this as a Reaſon; I think, 'tis Natural Juſtice in all Courts of the World, That if a Man be Accuſed as a Malefactor, he ſhould have the liberty to Croſs-examine the Perſon that accuſes him. Now we very well know, that in Caſe of Bills of Indictment, when they are found by the Grand-Jury, they never admit the Priſoner to put Croſs-Queſtions, becauſe the Bill of Indictment is but the Accuſation, and if an Accuſation be enough, who can be Innocent? Why, then if it be ſo, then this Oath that was given to the Grand-Jury, is not ſuch an Oath upon which you can put ſuch a value.

Then, Sir, go to the Paper of *Goodman*, which you would Read, and conſider the validity of that. *Goodman* upon his Examination, was Sworn before a Juſtice of Peace: Under favour, *Goodman* being now abſent, the Priſoner hath no Opportunity to Croſs-examine him; and I beſeech the Houſe to conſider the ill Conſequences of it; any Miniſter of State may come and get an Examination before a Juſtice of Peace, or

Secretary of State, and the Man is conveyed away, and a Bill of Attainder is clapped upon his back, and this ſhall be Read as Evidence againſt him. He is but half a Witneſs, and a Witneſs upon an Accuſation, not upon a Tryal.

Then come to Sir *John Fenwick*'s particular Caſe. Sir *John Fenwick* is Indicted, Iſſue is joyned, and he hath notice of his Tryal, and one of the Witneſſes goes away, no Man can tell upon what account he went; I may believe why, in my private Opinion, but that is not Judicial Knowledge: Then if that be ſo, was it ever known, that when any Man was Indicted, and Iſſue joyned, becauſe his Tryal was deferred, therefore a Bill of Attainder muſt be brought againſt him? Here are Plots againſt the Government, and it may be Forty may be taken up for it; and as to Twenty, there may be two Witneſſes, and the others may have the good luck to have but a ſingle Witneſs againſt them, will you have Acts of Attainder againſt all the reſt? If this had been an Extraordinary Caſe, wherein the Government had been principally concerned, it might have weighed with you; for no Man can ſhew me any Precedent of a Bill of Attainder, but where there were open Acts of Hoſtility, or Men of great Relation and Power were concerned to Subvert the Government: But what is Sir *John Fenwick*'s Caſe? He is in Cuſtody, and the Plot is Detected; if he was run away, you might ſtill ſuppoſe he was Plotting againſt the Government, becauſe he was fled from Juſtice. Gentlemen ſay the Government is concerned, ſo it is in every Felony and particular Treaſon, but muſt there therefore be a Bill of Attainder to puniſh it? When there is a Bill of Attainder, it muſt be from an immediate Danger that threatens the Government Eſtabliſhed, that ſuch a Man is Attainted: But I do not ſee that Sir *John Fenwick* hath any of theſe Circumſtances. All Men agree, That this is an Extraordinary way of Proceeding: Then the Queſtion is, Whether Sir *John Fenwick*'s

Caſe

Caſe be Extraordinary? Or whether he be more than a Common Malefactor that is in a wicked Conſpiracy? I do not ſee that this Caſe of Sir *John Fenwick*'s is ſo Extraordinary, that if he be not Hanged, the Government muſt fail.

And, under Favour, a Precedent when 'tis once made, I know not what Time may produce from it: It may be, after the Death of His Majeſty, that came to reſtore our Liberties, we may have wicked Members, and Members choſen as in *H. 6.* Time. It may be the Condition of every Subject of *England*. The Power of Parliament we muſt govern by Reaſon and Common Juſtice; and if there be not urgent Neceſſity to uſe this Extraordinary Remedy, becauſe it may be dangerous to Poſterity, I am againſt this Bill.

Sir Tho. Littleton. The worthy Gentleman took Notice, That the *Lancaſhire* Plot, and ſome Words I uſed, were uſed only to inflame: I can't ſo well gueſs at his Thoughts, but I have heard him ſeveral times bring his Wife and Children into his Speeches, to no purpoſe at all.

Sir Francis Winnington. I have a Wife and Children, and that Gentleman none; therefore I think I may make uſe of that Expreſſion.

Sir Edward Seymour. Mr. Speaker, I have attended your Debate with the beſt Attention I can; and I have heard a great many Arguments, and ſome very Wild ones too. I hope, how frightful ſoever Things have been opened, they will not lead your Underſtanding out of the Methods and Rules of Juſtice: I will not take upon me to tell you, what is nothing to the Queſtion; as that Treaſon is a very great Crime, or that the Parliament hath an unbounded or unlimited Power, and are not tied to the Rules of *Weſtminſter-Hall*; I think that is no part of the Subject-Matter before you.

That nothing bounds or can limit the Parliament, is what every body does admit; but 'tis the right

Application of that Power which is now to be conſidered of: For you may Judge the Priſoner, and others will Judge you. The World will Judge you, if you do not apply that Power aright.

For my part, I ſhall avoid, as much as can be, the ſaying of any Thing that hath been ſaid; and therefore I hope you will believe that my Diſcourſe muſt be very ſhort: But that which does move me in this Queſtion, is in ſhort this, That I do not give my Judgment to Condemn any Man otherwiſe than the Law directs how, and upon what Terms, I muſt give it; if the Law hath ſaid, that Treaſon is not to be Treaſon, unleſs it be proved by two Witneſſes, I am never to give my Judgment in that Caſe when there appears but one.

And this I take to be the ſtate of the Caſe, not to enter into Matters of Precedent of Attainders, for thoſe are only Inſtances of ſo many Facts that have been done. And in all thoſe Inſtances that have been urged and quoted, when Times have been ſedate and quiet, marks have been put upon them, (as was hinted by a Gentleman that ſpake very Ingenuouſly upon this Subject at the beginning of this Debate, I ſay, marks have been put upon them) for you to avoid, but not to imitate. I take it, that the Law hath determined that there ſhall be two Witneſſes to the Proof of Treaſon, and there is no Treaſon that hath not two Witneſſes to it. There is but one Attainder that we meet withal in Sacred Hiſtory, and that is the Attainder of *Naboth*; he was Attainted, and we know what induced that Attainder; he had nothing to Object as to the Formality of the Proceedings againſt him: And though *Jezabel's* Letter had diſpoſed the Rulers to deal by him as they did, yet there were two Witneſſes that did appear againſt him.

I take it, that two Witneſſes are requiſite for the Knowledge of the Truth, that you may make a right Judgment whether they ſwear right or no. I will give you but one ſmall Inſtance more; I muſt tell you

you *Suſannah* had been but in a bad Condition, if one Witneſs, and Circumſtantial Evidence, would have made her Guilty.

A Gentleman here ſays, 'tis *Apocrypha*: But that which weighs with me, is, that there may be Inconveniences on one ſide, and there are no Inconveniences on the other. I know not what may be the Conſequence of this Precedent, nor where it may bring you: I know the Conſequence if Sir *John Fenwick* be not Executed upon a Bill of Attainder; for no Body will believe there is a Neceſſity for this Extraordinary Remedy to be applied for an Offence a Year and half after 'twas committed, and when he hath been Indicted and Arraigned for it, and they might have proceeded to his Tryal, and I know not whether 'tis his fault that they did not, for it was not in his Power to prevent it: And if you, upon every Occaſion, come to ſupply the Defects of them that are remiſs in the Government, it will make them more ſo.

As to the Matter of Precedents, Why, it may fall out that by this Precedent an Innocent Man may be puniſhed, and then we that make this Precedent, are Guilty of his Blood; and if he ſuffer never ſo remotely, it will be required of us, if it proceed from this Precedent. Now, if Sir *John Fenwick* be not Executed, unleſs in a Legal way, What is the Conſequence of that? Is it that Sir *John Fenwick* ſhall go unpuniſhed? Though they are deprived of one Evidence that would make it Treaſon, he may be puniſhed for a Miſdemeanor, and Impriſoned for his Life; and I had much rather he did languiſh in that Condition, and I am ſure it is much ſafer for you, for no Inconveniency can ariſe that way; and I take it, that when thoſe that are our Guides diſpute which is the way, we are to take that which is the ſafeſt.

The Learned have diſputed, Whether this Matter, as now it is charged upon Sir *John Fenwick*, be Treaſon? I will not take upon me to determine it, they

differ about it; and when they can't determine it, will you by a Queſtion determine it abſolutely?

Upon the whole, there hath been ſo much ſaid by the Counſel for the Priſoner, and ſo little ſaid by the Counſel againſt him, and ſo few Arguments urged againſt him, that I muſt ſtill retain the Opinion I had, That there is not Evidence enough for you to proceed upon this Bill of Attainder.

Mr. Boſcawen. Sir, I deſire to give my Reaſons for my Opinion in this Matter. I have no Perſonal Diſguſt againſt Sir *John Fenwick.* The great Argument againſt this Bill is, That this is an Extraordinary Proceeding, and therefore ſhould be againſt an Extraordinary Perſon; and in the next place, that it is againſt the Rules of Law. The Rule of the Law is, That there muſt be two living Witneſſes; and Gentlemen generally agree, That 'tis within the Law of Parliament to Attaint Perſons by Bill of Attainder; but they ſay, this Power hath been often miſapplyed, which I do eaſily believe, becauſe ſome have been attainted, and have not been heard; and ſome have been in Tumultuous Times; but this Gentleman hath had a fair Tryal, and a Debate in this Houſe. But I would fain know, though they confeſs Bills of Attainder may be, how it can poſſibly be, if the Lawyers at the Bar ſay true, That it muſt be upon Oath, and you give no Oath.

Some ſay, it may begin in the Houſe of Lords; under favour, I take it, That a Bill againſt a Commoner can't begin in the Houſe of Lords. And if you can't have Witneſſes upon Oath, you muſt have as much Evidence as the Nature of the Thing will afford; that is, you muſt have Witneſſes to convince your Conſciences in the Thing; for if all this great Aſſembly are ſatisfied in their Conſciences, that he is Guilty of inviting an Army of *French* to come into *England*, I am aſtoniſhed to think that you ſhould not paſs this Bill againſt him: I think, as to this Witneſs, *Porter*, they have not endeavoured to blemiſh him, but

their

their Argument ſeems to run more upon *Goodman*'s not being preſent. I would know if there are two Wineſſes, and I do not believe them in my Conſcience, whether I can paſs this Bill? But I appeal in this Caſe, *res ipſa loquitur*, the Thing is ſo plain. How many have been attainted and ſuffered for the ſame Crime, that have acknowledged Sir *John Fenwick* to have been preſent. There were ſeveral Members of the Houſe ſent to Examine Sir *John Friend*, and Sir *William Perkins*, in *Newgate*; and they were ſent with this Intimation, That the Houſe would Interceed with the King for a Pardon for them, if they diſcovered the full of the Plot; (it was not the Death of Sir *William Perkins* and Sir *John Friend* that was aimed at, but the Preſervation of the Publick) and when they were examined, they did acknowledge, that they were privy to the calling in of the *French*, and that Sir *William Perkins* was to have a Troop of Horſe, there was to be 2000 Horſe, but he would not redeem his own Life with the Blood of others. Now I do take it, that there is Evidence againſt Sir *John Fenwick* ſufficient in a Parliamentary way to Attaint him. The Gentleman ſays, the Conſequence of throwing out this Bill, would be nothing, and that Sir *John Fenwick* is a little Man; I agree he is, but 'tis the Conſequence of bringing in a *French* Army that is to be conſidered: Would you Pave the Way for them to come over, and make their Entrance eaſie? I hope the People of *England* are concerned in the Caſe, as well as their Wives and Children; if you let him go, what will be ſaid? I have not heard one ſay, that he believes he is not Guilty; there is none but think him Guilty, and yet will you let him eſcape? What Encouragement will this be to your Enemies? He hath not denied the Matter himſelf. Nay, he hath not brought one Gentleman to Vindicate him, that he is a Man of Behaviour, not to be believed to be Guilty of ſuch a Thing, which was done in other Tryals.

I deſire

I desire you would consider what the *French* King said of his Brother King *James*, How could he think to bring in Popery with a Protestant Army? I am sure the bringing in of a *French* Army must be for the Destruction of the People of *England*, and the Protestant Religion, and will bring your People to go in Wooden Shoes; 'tis the Example of this thing you are to consider. It was said at the Destruction of *Carthage*, That the Commonwealth was always to be minded: I think you ought always to be mindful for the Preservation of *England*; and I believe he is Guilty, and I am therefore for the Bill.

Ld. Digby. I shall trouble you but with a Word or two. I suppose as long as we Act by the known Rules of Justice, and the Laws of our Land, we shall not need to fear any Censure in our own Kingdom, or any where else; but 'tis a very uncertain thing for Gentlemen to be Judges in the Case of Life and Death, without any Rule to walk by; a great many will not allow us any Rule at all: I always took our Rule to be the Law of the Land, and that even our selves are bound by the Laws our Ancestors have made, till we think fit to Repeal them; and I am confirmed in this Case by one particular Argument from the Bill of Treason that passed last Sessions; in which there is a Clause, That it should not extend to future Parliaments. The only Arguments for exercising of this Power, is the Extraordinary Case of this Gentleman. When a Gentleman speaks of the Power of Parliament, I take it to be the just Power of Parliament; I think a Man may say, a Parliament can't do what they can't justly do. But all Gentlemen allow that this Power ought not to be exercised but in an Extraordinary Case, wherein the Government is nearly concerned: I believe very few but think if it had not been for the Vindication of some particular Gentlemen, we never had had this Matter before us; and then I will leave it to Gentlemen to consider,

conſider, if the Government can be in ſo much danger if Sir *John Fenwick* does eſcape.

Mr. Brotherton. Mr. Speaker, I perceive the Queſtion whether this Bill ſhall be Committed, ariſes very much upon a Suppoſition that ſeems to be granted, That there is no other Law to Try this Perſon by; and it hath been hinted, That before the Statute of *Edw.6.* one Witneſs was ſufficient: Now, if I ſhew you that here is a Law in being, and hath continued for ſeveral Hundred Years, whereby a Man may be Tryed, and that by one Witneſs, I think it is ſomething that hath not been ſpoke to yet.

Sir, I ground my Reaſon and Opinion upon the Authority of the Law, and upon the Hiſtorians of all Times, who agree in the thing, and come down to my Lord *Coke*, which is Printed by Authority; and he is expreſs, That where there is but one Witneſs, he Treats of what Witneſſes are neceſſary, and he tells you two Witneſſes were required by the Common Law for Treaſon, if the Perſon was Tryed by a Jury; but, ſays he, if there be but one Witneſs in Caſe of Treaſon, he ſhall be Tryed before the *Conſtable and Marſhal.* And in Treating of the Statute of *H.* 8. which does appoint how Treaſon beyond Sea ſhall be Tryed; ſays he, that is only where there are only two Witneſſes; but if there is but one Witneſs, he ſhall be Tryed before the *Conſtable and Marſhal*, becauſe, ſays he, the Statute of *H.* 8. does not take away that Tryal before the *Conſtable and Marſhal*; and for that, Sir, there are ſeveral Precedents in this Caſe, of Perſons that have been Attainted by a Court-Marſhal: And if the Accuſer was vanquiſhed, he was to ſuffer the ſame Judgment the Defendant was, if he was found Guilty. I am upon a Gentleman's Life, and never was ſo before, and deſire to be never ſo again; there have been ſeveral Precedents, I ſay, in this Caſe, and my Lord *Coke* is expreſs in the point; and I deſire any Gentleman to ſhewme any Law that hath Repealed this.

In

In caſe of Murther; ſuppoſe a Man be wounded upon the Land, and die upon the Sea, and I could ſhew ſeveral Caſes where the Common Law can't Try a Man by Jury, but he ſhall be Tryed before the *Lord Conſtable* and *Earl Marſhal*. Before the Statute of *Ed.* 6. If a Man was wounded in one Country, and died in another, he could not be Tryed by Indictment. That which I aim at, is to ſhew you, that though the Common Law ſhould fail, yet they need not come with a Bill in this Caſe: If two *Engliſhmen* beyond Sea fight, and one kill the other, it can't be Tryed by the Common Law: How then ſhall it be Tryed? It muſt be Tryed by the Court-Marſhal. And in the Caſe of High Treaſon, where there is but one Witneſs, the Party may be Arreſted or Appealed before the Lord Conſtable and Earl Marſhal, and it ſhall be Tryed by Combat: Of this way of Tryal there are ſeveral Precedents, as Sir *John Anneſley*, who Appealed *Ralph Katrington* of Treaſon, 3 *Rich.* 2. And a certain Knight of *Navarre*, who Appealed *John Welch* of High Treaſon, 8 *Rich.* 2. and the Knight was vanquiſhed. And 1 *H.* 4. between the Lord *Morley* and the Earl of *Sarum*. 8 *H.* 6. Between *John Upton* and *John Down*, who fought in *Smithfield*. 2 *H.* 6. *John* Lord *Talbot*, Lieutenant of *Ireland*, Arreſted the Earl of *Ormond* of High Treaſon before the Earl of *Bedford*, Conſtable of *England*. And in the time of King *Charles* the Firſt, in the Year 1631. *Donold* Lord *Rey* Arreſted *Ramſey* of High Treaſon before the Earl of *Lindſey*, made Lord Conſtable for that time. So that Sir *John Fenwick* may be Tryed, as others have been, without an Act of Parliament.

Memorandum, *Mr.* Brotherton *was here Interrupted by the great Noiſe the Houſe made upon the Novelty of the Argument, and did not go on farther with it.*

Mr. Paget. Sir, I attended to the Debate of this Day, and have not hitherto troubled you my ſelf, becauſe I did expect to be better informed by this Debate.

I think

I think the Subſtance of the Debate of this Day, hath been not ſo much to ſhew us by what Rule we are to go, as to ſhew us that we have no Rule to go by but our own Judgments. Sir, I never had the Honour to ſit in Parliament before this time, and therefore can't Quote Precedents of what hath been done in former Parliaments; others have taken a great deal of Pains to ſhew you, that it is in the Diſcretion of Gentlemen, and they are only to be ſatisfied in their Conſciences; I am not fond to hear my ſelf ſpeak, and therefore I hope I ſhall be favourably heard at this time; and I do think I have the more Reaſon to ſpeak at this time, from ſomething that fell from a very Honourable Gentleman at the Bar: If I do miſrepeat him, I hope he will excuſe me, for I do not do it with an ill deſign; but I think his Words were to this effect, That he did not know, but if it was known in the Country, that Gentlemen did give their Judgment againſt paſſing of this Bill, it might hinder their Election in future Parliaments. Sir, ſince there ſeems to be ſo great ſtreſs upon our Determination in this Matter, I hope I may at this time ſhew you my Reaſons why I can't come up to agree in this Bill; and I ſhall ſubmit it to them, whether they will do me the Honour to chuſe me again. I muſt confeſs, I do think this is as nice a Caſe as I can pretend to give my Opinion in; and as it is ſo, I ſhall deſire the beſt aſſurance of the Truth of this Matter, before I give my Opinion for the paſſing of this Bill.

Sir, you have had before you one Evidence, I will admit him to be as much as a ſingle Evidence can be. As to the Paper of *Goodman*'s Examination, I have heard that, and other Matters too, which I ſhall not repeat: But I do remember, that in the Debate of Yeſterday, it was not inſiſted on to be another Evidence; and if not ſo, I ſhall only take the Matter as depending before you upon one Evidence only.

Sir,

Sir, it is true, I believe this Houſe, as to its Legiſlative Proceeding, is not tyed by the Methods of Inferiour Courts: But I hope I ſhall be excuſed, if in the Methods of Proſecution and Conviction of Offenders, after they have been preſcribed by the Wiſdom of the Parliament, I believe this Houſe can't take away any Perſons Life upon leſs Evidence than Inferiour Courts could do.

And, Sir, I ſhall not enter into any very long Vindication of my ſelf, and my Zeal and Willingneſs to ſerve this Government; I never was employed in any other Government, and I think my Actions have been ſuch, that no body can inſtance in any one Thing that hath looked otherwiſe; and when I have ſaid this, I ſhall trouble you no further about that: But there hath been ſo much ſtreſs laid upon this Bill, that whoſoever ſpeaks againſt it, ſeems to ſpeak againſt the Government; but becauſe it is ſaid, the paſſing of it is ſo neceſſary for the Support of the Government. And I was the more willing to offer you my Reaſons, becauſe, as the Nature of this Debate has been, I can't ſatisfie my ſelf where my Judgment and Opinion ſhall reſt: For if it be ſo, that you are not tyed to have as much Evidence as Inferiour Courts, and, as they ſay, one Evidence is enough, and my Judgment may be guided by Papers, then they, without any Evidence, may be enough to ſatisfie: And if you take up with leſs Evidence than Inferiour Courts, I don't know how little Evidence may take away a Man's Life.

As to the Priſoner, I know him not; but I think this Bill is for all that he hath to loſe, and is for all the beſt *Engliſhman* can loſe upon the like Occaſion.

Sir, I ſhall be very tender in giving my Opinion for the Bill, unleſs it was very clear to me that it was Reaſonable. Truly I have heard very little of the whole Plot, or of this Matter that hath been Examined, or for which others have been Executed; my Life has been generally in the Country, and I have

not

not had the Curioſity to buy the Tryals; and as this is the firſt Perſon that hath been brought before me, to give my Judgment on, I hope I may be excuſed for taking this Liberty, upon ſuch Evidence as appears before us, to tell you, I can't give my Conſent to this Bill.

Sir Will. Lowther. Sir, you have had a very long Debate in this Houſe, and long Diſcourſe from the Bar; and though the Counſel was directed that they ſhould not Diſpute the Priviledges and Authority of this Houſe, yet, as far as my Judgment carries me, their whole Diſcourſe was againſt it: And moſt of the Gentlemen that have ſpoke againſt the Bill, it hath been becauſe it hath not been adequate to the Proceedings of the Courts in *Weſtminſter-Hall*, becauſe there hath been but one Witneſs. Sir, if there had been two Witneſſes, this Houſe had not been troubled with it: It is a Caſe of a very extraordinary Nature, and ſo required an extraordinary Proceeding.

It hath been queſtioned by ſome Gentlemen, Whether one Witneſs be ſufficient in this Caſe, or no? Which I wonder at, ſince a great many have been Convicted upon his Evidence, and every one of them has confeſſed, which ſhews it to be a notorious Truth.

There is another Inference they draw from the Proceedings here, becauſe a great many of thoſe Precedents of Attainders have been reverſed, and thoſe with Notes of Ignominy. If they did conſider the Times they were made in, and the Times they were reverſed in, there might be a great deal of Cauſe for it: We find that it was contrary Factions that reverſed them, and that makes it never the worſe. And truly, Sir, I do not know but where Circumſtances are ſo notorious, they are *tantamount* to a ſecond Evidence, as I have heard in *Weſtminſter-Hall*, and in Caſes of Life too. If a Man be murthered, and two in a Room, and one comes out with a bloody Sword, the Law does preſume that Man murthered him, though

there

there is no particular Evidence that he murthered him, but only this Circumſtance; and yet the Man's Life is concerned in that Caſe. So that upon the whole, it appears to me that he is Guilty, and, I think, nothing can be plainer.

There is another Circumſtance, That he Fled for it; and that is a Preſumption of a Man's Guilt: For a Man loſes his Goods if he flies for Felony.

Mr. Harley. It would be very unreaſonable and impertinent to trouble you long after ſuch a Debate; I ſhall avoid Repetition of what hath been ſuggeſted to you, much better from other Perſons than would have been from me.

I own 'tis a Caſe of great Concern, and 'tis my Misfortune that I ſhould ever ſit upon a Thing of this Nature; but I will diſcharge my Conſcience always, and give what Arguments occur to me, why I am againſt this Bill.

Gentlemen have been pleaſed in their Arguments to enter upon the Debate of your Power and Authority, and have made that a part of their Argument; but I think, with Submiſſion, we need not Diſpute that at all. It is admitted, that there have been Bills of Attainder paſſed formerly, and your Authority is not under Diſpute; for the Legiſlative in all Nations have a Power lodged in them, for the Safety of the Whole.

But your proper Enquiry is, Whether this is ſuch a Caſe as you ought to exerciſe this Extraordinary Power; *Omne regnum ſub graviore regno:* Though you have this abſolute Authority, yet 'tis to be executed by the Rules of Reaſon, and by the Rules (for ſuch there are) of Eternal Juſtice; and I look upon this as one that is inviolable, That no Man can forfeit his Life, in ſuch a Caſe as this is, without two Witneſſes. I muſt adhere to that; becauſe I have heard nothing in this Debate that can make me quit that Maxim: And 'tis ſuch an Ancient Land-mark, that I will never draw a Curſe upon me and my Poſterity, for removing

removing of it. I beg Pardon that I ſpeak with this Earneſtneſs to you.

Gentlemen have been pleaſed to make it part of their Arguments, The great Danger the Government is in, if this Bill does not ſucceed. I will not uſe many Words, but I think that Argument ought not to be taken in the Groſs. Let it be examined, Whether this Argument, of the Hazard of the Government, is of equal Poize for you to break the Eternal Rules of Juſtice. I won't quote the Caſe at large, every Gentleman knows it, (though there were two Witneſſes in that Caſe to put an Innocent Perſon to Death) where it was urged, *The* Romans *will come and take our State and Nation.* But with how much Reaſon that was urged, every Body knows; and how far the Government is now in Danger, let us conſider. Is this Gentleman out of your Power? Is the Government in Danger of a Man that is your Priſoner? Is he in open Rebellion againſt you? If this Law does not paſs, if you have not your Hands in his Blood, is he not under the Power of the Law? Did not he tell you ſo himſelf?

Every Gentleman ought to have a Zeal for the Government, and I wiſh it was as viſible in every Thing elſe; but if that be ſo, give us leave alſo to ſpeak with Zeal for our Liberty, and Ancient Conſtitution. The Argument is turned two ways; on one ſide you are told, That this probably may make him Confeſs ſomething; and by others, He is to be made an Example of Puniſhment. This is the firſt Bill of this Nature; but the ſame Reaſon that leads you to this, muſt lead you to all the reſt: The ſame Reaſon that is urged for this Bill to make him Confeſs, will lead you to bring in a Bill to make him a good Evidence. This every Body muſt allow to be the Conſequence of it.

How does this Bill come before you? It comes before you upon a Villainous, Scandalous Aſperſion of ſome great Men. Though I know them not all, yet I

have a great Value for them, and I would make their Caſe my own: But if they were the neareſt Relations I had, I would be againſt this Bill even upon their Account; and let any one Examine the Reaſon of it.

Sir, I won't run into Precedents; but only becauſe it hath been told you, That the Precedents were made in one Reign by one Faction, and then the Attainders were reverſed in another Reign by another Faction, there is one occurs to my mind, which hath been touched at, and is at leaſt of particular Inſtruction to me: There was a Caſe in *Ed.* 3d's Time; A King had been Depoſed, and barbarouſly murthered: There was no diſputed Title, but his Son upon the Throne; the notority of Fact, and its hainouſneſs ſtirred up many Heats, which brought in an Attainder, and particularly of a very great Peer: But four Years after, a Bill was brought in againſt the Earl of *March*; and one of the Article againſt him was, That he had procured the Attainder of that Noble Lord, under Pretence of ſome Letter or Paper, that was ſigned by him; which, if it was ſo, ſays the Record, was no Evidence.

I lay this before Gentlemen, to ſhew them how Things have turned, and Precedents that have been made very unanimouſly, but in bad Times have been turned to ſhed the beſt Blood in *England*. It grieves me to my Soul to hear of Mr. *Corniſh*, whoſe Attainder you have reverſed, to hear that quoted as a Precedent in this Houſe: 'Tis not whether two Witneſſes be the Rule of *Weſtminſter-Hall*, 'tis the Rule of right Reaſon; and 'tis a Maxim in your Law, Make what Law you will againſt the Law of God, 'tis void: And this is the Law of God, and right Reaſon.

You muſt provide for the Government, and Armies muſt do it, when the Courts are ſhut, and Laws are ſilent, but 'tis hard to pervert the Methods of Common Juſtice without any neceſſity. I hope Gentlemen will not

not put a hard Conſtruction upon what *I* have ſaid, I have done it to diſcharge a good Conſcience.

Mr. Chanc. of Excheq. Sir, I am for the Commitment of this Bill, becauſe in my Conſcience I think Sir *John Fenwick* is Guilty; and becauſe I think the Power of Parliaments may interpoſe in this Matter: And if they have ſuch a Power, I think they may juſtly exerciſe it in this Caſe.

Gentlemen ſay, they will not Diſpute the Power of Parliament; and yet in their Arguments they tell us, we are not to proceed otherwiſe than according to the Forms of Inferiour Courts. And if the Parliament is not to proceed without two Witneſſes in the Caſe of Treaſon, give me leave to ſay, there is no manner of room left for a Bill of Attainder, unleſs you will take the Buſineſs of Inferiour Courts upon your ſelves: And I am confident ſeveral Gentlemen, if there were two Witneſſes, would uſe it as an Argument, What have you to do with it, refer it to the ordinary Courts of Juſtice? And I am ſure that would be very reaſonable. But I do think that Parliaments have this Power, and they have always uſed it; and I believe 'tis for the Advantage of your Conſtitution. The Inferiour Courts are to go by the Letter of the Law, and whoever can avoid that, is to eſcape Puniſhment there; but the Legiſlative is not to be dallied with: And if the Offence be of that Nature, that Inferiour Courts can't reach it, they can go beyond all Forms to preſerve the Government. This they have done, and upon that Principle you ſit here. Was it by the Forms of Common Juſtice below, that you declared the Throne to be Vacant, and King *William* to be Lawful King? Is it upon the ordinary Rules of *Weſtminſter-Hall* that his Title does depend? No; it depends upon this Maxim, That the Parliament of *England* are entruſted for the Whole, and may Conſtitute a Government for the Preſervation of the Whole. And upon the ſame right Principle that I gave my Vote to declare him Rightful and Lawful King, by the ſame Principle I declare his Enemies to be Traytors.

You are told here, 'tis according to the Law of God and Nature, that there muſt be two Witneſſes in Caſes of Treaſon: I do not pretend much Skill in other Parts of the World, I think 'tis our particular Happineſs to have this way of Tryal; I think in any other Part of the World, if he had dealt thus with the Government, he would have had another manner of Proceeding againſt him, than to be Condemned by King, Lords, and Commons: But that is your Conſtitution, but it does not hold in other Parts of the World.

Some Gentlemen lay the ſtreſs of their Argument upon the ill Conſequence it may have in another Reign; I would avoid ill Conſequences in another Reign as much as I could, but our immediate Care is the preſerving of the preſent Conſtitution.

But if Gentlemen are apprehenſive, that by ſuch an Example, if King *James* ſhould return, others may be puniſhed; if we may Judge what he would do, by what he hath done, he would go another way to work: If he came to *London*, he would proceed as his Party did at *Dublin*, and Attaint all the Proteſtants in one Common Bill; that is the Precedent he hath ſet, and he will follow. And therefore in Order to prevent that, and in Order to puniſh our Enemies, and to preſerve the Conſtitution and Prerogative of Parliament in all Points; and becauſe I am convinced in my Conſcience he is Guilty, I ſhall give my Concurrence for Commitment of this Bill.

Col. Granville. Sir, I would not preſume to trouble you at this time of Night, was the Debate upon a leſs Subject than it is; but ſince you are going to pronounce Judgment in a Caſe of Life and Death, and we are told, this Houſe is above any Rule, and that we have no Precedent comes up to the Caſe in queſtion, but that every Gentleman is to find out private Rules to walk by, I think it my Duty to declare by what Rule I ſhall govern my ſelf in this Matter; which is this, I will deal with Sir *John Fenwick* to

Night,

Night, as I would have Mankind deal with me, if I was in Sir *John Fenwick*'s Place. Now, if I was Indicted of Treaſon, and not allowed any Tryal, nor the Benefit of making my Defence according to the known Laws of the Land, I ſhould think my Blood unjuſtly ſpilt, let me be never ſo Guilty.

The Laws are ſet up for the Defence of every Man, and when once we break through them, whatever our End may be at that time, and though it may in ſome manner ſeem juſtifiable, when it is to come at the Puniſhment of an Ill Man; yet pray conſider, the beſt of Men may as eaſily be reached by this Extraordinary manner of Proceeding, as the worſt of Men. And what makes me very cautious, is, that my Hands are guiltleſs of Blood yet, and I will take care how I begin to dip them in it. And that which will always make me cautious in any Caſe of this Nature, is, when I read in the Hiſtory of the late Times, that when once a Set of People had begun to dip their Hands in the Blood of my Lord *Strafford*, nothing would quiet them till they had ſtained their Hands with the Royal Blood. The Laws are ſet up as a Common Fence between the King and People; and the King (as well as People) is always ſafeſt when the Laws are moſt ſtrictly obſerved.

I ſhall not pretend to talk of your Power, which certainly hath no other Bounds but your Juſtice and Diſcretion; but I hope you will never exert the Extraordinary Power that is lodged in you, but in ſuch Caſes as will meet with Approbation abroad. Sir, I hear our Proceedings upon this Bill of Attainder called a Tryal, but I cannot think it any; and, with Submiſſion, I do think we are a very unfit Court to determine this Matter. We ſit in ſo many Capacities, 'tis hard to diſtinguiſh in what Capacity we Act: Some of us are Witneſſes, ſome are Proſecutors, ſome others are accuſed; 'tis hard to be accuſed, and to be a Judge at the ſame time. I am ſure I am as much concerned as if I was accuſed my ſelf, being ſo

nearly related to one that is; and it is for his Innocence and Honour that I think my ſelf bound to oppoſe the paſſing this Bill. For as no Reſentment ſhall make me do any thing that is unjuſt, ſo I fear nothing that he can ſay, and I ſcorn to ſtop his Evidence, by cramming a Bill of Attainder down his Throat.

Beſides, it is an unfit thing for any Gentleman, who is obliged to be of Counſel for the King, to ſit here as a Judge: I think alſo, to proceed in this manner, is a diſreſpectful Thing to the King himſelf; for in this Caſe you turn the Throne of Mercy into the Seat of Judgment. The King, who ſhould have all the ways to ingratiate himſelf with his Subjects, you make him, by this Proceeding, to pronounce the Sentence himſelf upon the Life of a Subject. It is hard therefore to offer a Bill to the King in ſuch a manner, by which you oblige him either to reject it, (which was always looked upon as a Hardſhip when done) or to paſs Sentence upon this Gentleman, which perhaps his Gracious Temper and Mercy makes him averſe to.

Sir, it is too late to give you other Arguments, and you have heard from other Gentlemen a great many better than I can give; but I think this Bill is Unjuſt in its Riſe, evil in the Progreſs of it, and dangerous in its Conſequence, and therefore I hope you will not Commit it.

Sir H. Crofts. Sir, I did not think to trouble you in this Debate, but only for the Arguments that have been uſed by ſome that ſpake lately, who ſeem to lay a great Load upon Men, according as they give their Vote in this Matter, becauſe 'tis in relation to the Blood of a Man. I have conſidered the Point, I hope, with as much Caution as any Man within theſe Walls, and hope to act with as ſtrict a Conſcience as any Man whatſoever; and ſhall be very glad to be informed from thoſe Gentlemen, that have laid the ſtreſs ſo hard upon Religion, how they can ſhew

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me, that I do not as ſtrictly, as to all Points of Religion, give my Vote for paſſing of this Bill, as they would Excuſe themſelves from it. I muſt agree with thoſe Gentlemen, That you are in no wiſe bound, or limited, to the Rules of *Weſtminſter-Hall*; and therefore what was ſaid upon that, I did not think worth taking notice of: But when we are told, We are bound up by the Laws of Nature and Religion, and the Law of God in this Matter, that touches me ſo nearly, that I muſt deſire thoſe Gentlemen to ſhew me in Scripture the Law that they quote.

If it be the Law of Nature, and the Law of God, that every Man that dies muſt be Convicted by two Witneſſes, as an Honourable Perſon obſerved, I wonder it is not obſerved by all Chriſtian Nations and Governments, that they are not all governed by this Law; if there be any Direction from the Law of God, that no Man is to die for Treaſon without two Witneſſes, but he may ſuffer for Murther and Felony with one Witneſs. Now, I ſay, I muſt deſire the Gentleman that aſſerts it, that he would pleaſe to ſhew me it in Scripture, and I will be entirely of his Opinion: But till I hear that very plainly proved, 'tis not within my Reading nor Remembrance; and therefore I deſire it may have no weight. And now I am up, I ſhall give you my Reaſons why I ſhall give my Vote for this Bill.

The Reaſon that Governs me, is the Preſervation of the Government, and the Commonwealth under which I live, and which I think, I am, in the Station wherein I ſtand, bound to preſerve, by all the Rules of Juſtice imaginable. Now, if your Law hath bounded Inferiour Courts, but have not bounded you in this Matter, though you have ſaid Inferiour Courts ſhall not determine and give Judgment in ſuch a Caſe, yet, I think, you are not bound up ſo here: But if the Matter be proved to my Satisfaction, I may give my Judgment according to the Evidence that comes before me, without that Reſtriction.

But, Sir, this ought not to be done, 'tis ſaid, but upon Extraordinary Occaſions. You were told, ſome Time ſince, of the Caſe of the Duke of *Monmouth*; but it was ſaid, That he was Attainted becauſe he was in Arms, and could not be come at otherwiſe: But I think this is a parallel Caſe to that, if not much ſtronger; for here is a Perſon that hath been Accuſed, and fully Proved to have been in Rebellion, and in Treaſonable Practices with your Enemies, to bring an Invaſion upon you, and to ſubvert your Government; and though he hath not been proved to have been in that ſingle Act of the Aſſaſſination, yet there is ſuch a Correſpondence between one and the other, that I do look upon him as equally Guilty of both. Therefore this having been ſo fully proved, and the Perſon that ſtands accuſed being out of the reach of the common Courſe of the Law; What Remedy have you, but to fly to your Legiſlative Power, to Attaint him upon the Grounds and Allegations in your Bill? That one Witneſs is withdrawn, I am very well ſatisfied, and I think we may preſume 'tis by his own, or his Friends Encouragement or Procurement. And I do take this to be as reaſonable a Ground for your Bill, as any Thing in the other Caſe: And I know not what is an Extraordinary Caſe, if this be not one. Is it not an Extraordinary Caſe, for a Plot to be laid for the total Subverſion of this Conſtitution, and our Religion for ever, and we can't come at it to puniſh it another way? But it hath been ſaid, the Safety of the Government does not depend upon him: If we acquit him, we are to acquit every one alike: I hope the Government does not depend upon him alone; but if you clear him, there is the ſame Right to clear any Criminal whatſoever, and we may be anſwerable for any future Miſchief that happens to this Government. Sir, ſince I am brought upon giving my Judgment in this Matter, (though I come as unwillingly as any body to it) I muſt go according to my Conſcience; and till I can ſee ſomewhat of the Law of God, that

has

has been hinted at, made out, I muſt go according to the Law of my Reaſon; and that is, that I muſt be for this Bill.

Ld. Norreys. I will not pretend to tell you what the Authority of this Houſe is, 'tis what they pleaſe to make it: But I am ſure they will ground it upon good Reaſon; but I think the Reaſon chiefly given for the Commitment of this Bill, leaves you a Latitude to do what you pleaſe, and give no Reaſon at all; for it is only to ſay, I am convinced in my Conſcience this Man is Guilty; no matter upon what Proof, no matter whether any Proof or not, you may believe it from his Life and Converſation, and the Company he keeps, or from his Intereſt, and that may be Argument enough to find a Man Guilty. But till I know a Reaſon better grounded than this, I cannot be for the Commitment of this Bill.

Sir Chriſt. Muſgrave. I am ſure at this time of Night I am unfit to ſpeak in ſo great a Matter; I muſt confeſs I ſhould not have troubled you, if it had not been in the Caſe of Blood.

You have had a great Debate before you of the Power of Parliaments, and that hath been ſufficiently argued; and I have not Learning enough to give you any Precedents that have not been already quoted: But every body does agree in this, That what Power you have of this kind, is not to be exerciſed but upon Extraordinary Occaſions. Now, I would be glad to know, What this Extraordinary Occaſion is?

Every body allows, That Treaſon is the greateſt Crime a Man can be Guilty of; and the Charge of this Gentleman is High Treaſon: But therefore, in this Caſe, muſt you exerciſe this Authority? Pray wherein does this Caſe differ from any other Caſe of High Treaſon, that any other Perſon may be Practiſing againſt the Government? All the Difference I can make of it, conſiſts in two Points; the one is, That he hath Prevaricated with the Government; and the other, That Gentlemen ſay he hath been a Means of

Procraſti-

Procraſtinating his Tryal, in which Time an Evidence had made his Eſcape. Sir, I will allow you, that 'tis a very great Crime for any one to aſperſe ſo Great Men as he hath done; but I would be glad to know, whether there being ſuch an Ingredient, it be ſufficient to Attaint him of High Treaſon upon that Account.

Then as to that of a Witneſs being gone, Gentlemen have ſaid, They are apt to believe, and there is great Preſumption that he hath been the Occaſion of this *Goodman*'s being gone. Is that an Ingredient ſufficient, though at preſent it hath not been proved to you? But if it had been proved, I ſhould not however think that is Treaſon. Then if this be the only difference between this Gentleman, and any other Perſon that ſhall be practiſing to Subvert the Government, I would know, if there be but one Witneſs againſt any Man, for Conſpiring againſt the King, if they may not have recourſe to this Precedent, to proceed againſt him by Bill of Attainder? For the Argument is, Whoſoever is endeavouring to Subvert the Government, provided there be but one Witneſs, you are obliged, by vertue of your Legiſlative Power, to bring a Bill of Attainder againſt him. And what then? Of what uſe is the great Care and Wiſdom of your Anceſtors, and your ſelves too, that where a Crime is ſo great, and the Puniſhment ſo great, there ſhould be two Witneſſes?

I was mightily ſurprized to hear Gentlemen tell you, That two Witneſſes is a Form in your Law, and a Form in inferiour Courts: I never could believe that was a Form; for according to your Law, no Man ſhall be declared Guilty of Treaſon, unleſs there be two Witneſſes againſt him; ſo that it gives, in a manner, a Determination to the Crime; that I take to be the Caſe.

A Gentleman told you, That he was fully ſatisfied by the Proof, that this Gentleman is Guilty: But how can a Man ſatisfie his own Conſcience, to Condemn

any

any Man by a Law that is ſubſequent to the Fact? For that is the Caſe; and pray ſee the danger of Precedents: It now will appear upon your Journal that you have cauſed to be read, a Depoſition of a Perſon that was abſent, taken before a Juſtice of Peace, when the Perſon accuſed had no Opportunity to Interrogate him, and likewiſe that you have heard a Witneſs as to what a Man ſwore in the Tryal of another Man. All this will appear upon your Books.

And truly, I would be glad to know if another Age may not be apt to think that you took theſe to make good the Defect of another Witneſs; and then I muſt Appeal to you, if you have not admitted of a Teſtimony, which by no Law is admitted.

They ſay, you are not tyed to the Rules of *Weſtminſter-Hall*, nor their Forms: Is there any Law in being, that ſays, a Judge may hear a Witneſs as to what was Sworn upon the Tryal of another Perſon, to Condemn him that was not Party to that Tryal? If there be no ſuch Law, then the Rule is founded upon Juſtice and Common Right, that nothing ſhall be brought againſt a Man when a Man was not a Party when the Oath was made, and he had no Opportunity to Examine him.

I thought it my Duty to tell you, That when you have made this Precedent, if any Perſon ſhall be Accuſed of Treaſon but by one Witneſs, there will be the ſame Reaſon to proceed thus againſt him.

Then (being a little before Eleven a Clock at Night) the Queſtion was put, *Whether the Bill ſhould be Committed?* And the Houſe Divided.

Ayes 182. *Noes* 128.

So it paſſed in the Affirmative, and the Bill was Committed to a Committee of the whole Houſe.

Veneris 20 *die Novembris*, 1696.

The Houſe Reſolved into a Committee of the whole Houſe upon the ſaid Bill, and ſeveral Words being offered as an Amendment to the ſaid Bill, to Import

Sir

Sir *John Fenwick*'s being Guilty; at laſt the Words that were Agreed on, were theſe, (*Of which Treaſons the ſaid Sir* John Fenwick *is Guilty:*) It was alſo Propoſed to the Conſideration of the ſaid Committee, Whether the *Lords Spiritual* ſhould ſtand in the Enacting Part? But upon looking into ſeveral Acts of Attainder, it appeared they were mentioned in all of them, in the Enacting part, and ſo the Committee was ſatisfied in that Point; and they were left to ſtand in the Bill by general Conſent, and the Bill was Ordered to be Reported to the Houſe; and afterwards upon the Report, the Houſe agreed with the Committee in the aforeſaid Amendment of the Words, Importing Sir *John Fenwick*'s being Guilty.

Mercurii 25 *die Novembris*, 1696.

The ſaid Bill againſt Sir *John Fenwick* was Read the Third Time.

Mr. Methwen. Mr. Speaker, I have not troubled you in any of thoſe long Debates you have had upon this Occaſion, and do it unwillingly now; but I do think it every Man's Duty, in a Caſe of this great Importance, freely to own his Opinion, and give his Reaſons for it.

The greateſt part of the Debate hath run upon two Things; on the one ſide, the Inconveniency of Bills of Attainder, or at leaſt the having them too frequent. On the other ſide, That it is neceſſary to have them ſometimes, that no Perſons might think they were out of reach, if they could evade the Laws that were made to Puniſh ordinary Offenders.

I think, both theſe Points too general, and that this Bill, as every other, ought to have its Fate upon the particular Circumſtances of the Caſe before you; and whoever gives his Affirmative to this Bill, ought to be convinced, that Sir *John Fenwick* is Guilty of High Treaſon; and alſo, that there are Extraordinary Reaſons why the Nation does Proſecute him in ſo Extraor-

Extraordinary a Manner; and I do think neither of theſe is ſufficient alone.

If between the Indictment and Arraignment, or Tryal, *Goodman* ſhould have died, and there had been no other Reaſon for Attainting Sir *John Fenwick*, but only the want of his Evidence, I ſhould not have thought it a ſufficient Reaſon, though we ſhould have had an Opportunity of being informed of his particular Evidence, and believed him Guilty; and if Sir *John Fenwick* does not appear Guilty, I do not think any Reaſon of State can juſtifie this Bill, though he hath Prevaricated, and behaved himſelf to the diſſatisfaction of every body; therefore, I think, there muſt be both theſe.

You have heard the Evidence, I ſhall not repeat it, but rather come to thoſe things that diſtinguiſh Sir *John Fenwick*'s Caſe; only thus, you have received the Evidence againſt Sir *John Fenwick*, and given him Liberty to make his Defence, and have fully heard him, which I think hath altered the Reaſon of a great many Precedents cited from my Lord *Coke*, and other Authors.

That which Diſtinguiſhes this Caſe, is the great Danger the Nation was in from this Conſpiracy, and the Senſe the Nation hath had of it; and I find, by the general Opinion of all Perſons, this Danger is not thought yet at an end.

There ſeems likewiſe to be an Opinion as general, That Sir *John Fenwick* could have contributed to your Safety by a Diſcovery.

The next Circumſtance is, that Sir *John Fenwick* knowing this, and the Expectation the Nation had from him, that he could have contributed to your Safety, hath made uſe of that to put off his Tryal; and at laſt, has made ſuch a Paper as does ſhew an Inclination to do you all the Prejudice he can, and tended to the Creating of New Dangers, and by this means Sir *John Fenwick*, againſt whom there was two Witneſſes when he was Indicted, hath delayed his

Tryal,

Tryal, ſo that now there is but one; and there is a violent Preſumption, that this Perſon is withdrawn by the Practice of Sir *John Fenwick*'s Friends.

There remains yet with me, as great a Conſideration as any of theſe, The Publick Reſentment of the Nation for ſuch his Behaviour, is the only means his Practice has left you to prevent the Danger that yet remains; and it ſeems neceſſary for your Safety, to come the next beſt way to what he could have done for you by his Diſcovery.

Againſt the Evidence that hath been given, there have been great Doubts raiſed, not ſo much whether it be ſuch Evidence as ought to incline us to believe him Guilty: But whether it be ſuch as you ſhould hear in the Capacity you are in; and whether after it is found ſuch as it is, that is to ſay, not ſuch as would Convict him upon another Tryal, Whether you ought to Credit it, and that it ſhould influence you to give your Vote for this Bill of Attainder? This is a Doubt that I find weighs generally with them that differ from me in Opinion about this Bill; and therefore I deſire leave to ſpeak to that Particular.

'Tis ſaid, That you are Trying of Sir *John Fenwick*, that you are Judges, and that you are both Judges and Jury, and that you are obliged to Proceed according to the ſame Rules, though not the Methods of *Weſtminſter-Hall*; *Secundum allegata & probata.*

But the State of the Matter, as it appears to me, is, That you are here in your Legiſlative Power, making a New Law for the Attainting of Sir *John Fenwick*, and for Exempting his particular Caſe from being Tryed in thoſe Courts of Judicature, and by thoſe Rules which you have appointed for the Tryal of other Cauſes, and Trying of it your ſelves, (if you will uſe that word, though improperly) in which Caſe the Methods differ from what the Laws made by your ſelves require in other Caſes; for this is never to be a Law for any other.

Methinks

Methinks this being the State of the Caſe, it quite puts us out of the Methods of Tryals, and all the Laws that are for limiting Rules for Evidence at Tryals in *Weſtminſter-Hall*, and other Judicatures: For it muſt be agreed, the ſame Rule of Evidence muſt be obſerved in another Place, as well as *Weſtminſter-Hall*. I mean in Impeachments, and it has always been ſo taken.

The Notion of two Witneſſes being neceſſary, has ſo much gained upon ſome Gentlemen, that we have had it ſaid, That this is required by the Law of Nature, the Univerſal Law of Nations, Nay, by the Eternal Law of God. And I think, if it was ſo, there would be no doubt but it would oblige us.

And therefore to go to the bottom of the Matter: That any Man deſerves to be puniſhed, is becauſe he is Criminal. That this or that Man deſerves it, is becauſe he is Guilty of a Crime, let his Crime be made evident any way whatſoever; for whatſoever makes the Truth evident, is, and is accounted in all Laws to be Evidence.

Now the Rules for Examining whether any Perſon is Guilty or not, and the Evidence that is allowed as ſufficient is different in all Nations, no two Nations agree in the ſame Evidence for the Tryal of Criminals, nor in the Manner of giving the Evidence againſt them.

Your Tryals differ from all other Nations, not only that you are Tryed by a Jury, which is particular to you, but that the Witneſſes are to be produced Face to Face before the Offender; and you have made Laws that there ſhall be two Witneſſes in Caſes of High Treaſon, and herein you are the Envy of all other Nations.

Sir, the Evidence that is to be given againſt Criminals, differs in the ſame Nation when the Offence differs; there is a difference between the Evidence that will Convict a Man of Felony, and the Evidence that is to Convict a Man of Treaſon; and the Evidence

to Convict a Man for the ſame Crime, hath been different in the ſame Nation at different times. No doubt, by the Common Law of *England*, that Evidence was ſufficient to Convict a Man of any Crime, which was ſufficient to make the Jury believe the Perſon Guilty. Thus before the Statute of *Edw.* 6. a Man might be convicted of Treaſon by one Witneſs, though that Statute was made upon great Reaſon, and appears to be for the Publick Good, by the general Approbation it hath received; but I don't think in your Proceedings here, you are bound by it.

But, Sir, it is ſaid, Shall we that are the Supream Authority (as we are part of it) go upon leſs Evidence to ſatisfie our ſelves of Sir *John Fenwick*'s Guilt, than other Courts? And ſhall we reſort to this Extraordinary Way in this Caſe?

Truly, if it did ſhake the Manner of Tryals below, I ſhould be very unwilling to do it; but I do take it clearly, that it cannot make the leaſt alteration in the Proceedings of any Court, but on the contrary, I think there is no ſtronger Argument for your reſorting to this Extraordinary Way, than that of the Care and Caution with which your Law hath provided for the Defence of the Innocent. For if we conſider all thoſe Laws that have been made for that purpoſe, 'tis plain it muſt have been in the view of our Anceſtors, that many Criminals might by this means eſcape. Your Laws are made for your Ordinary Tryals, and for thoſe things that happen uſually, and there is no Government we know in the World where there is not reſort to Extraordinary Power in Caſes that require it; your Government indeed hath this Advantage, That you can keep to Rules which others cannot: For in a very wiſe Government (as was obſerved by a Perſon that was in this Houſe the laſt time this was Debated) all the ways of puniſhing Crimes of this Nature, are Extraordinary. Perſons are condemned there, not only unheard, but they are condemned before they are accuſed,

accuſed, and that is thought neceſſary there, which will not be endured here: And yet that Government hath continued ſo many Hundred Years, and no endeavours have been to alter it, though ſo many Noble Families have ſuffered by it, becauſe they are convinced as to their Conſtitution 'tis neceſſary.

The next Argument is from the Precedent you are about to make, and you have been told, whatever the other Precedents have been, what you do now, will be a Precedent for you and your Poſterity, and whilſt that Argument is uſed only to make you cautious, and to make you conſider well, whether it is according to the Duty to your Country to paſs this Bill (which no doubt is the only Queſtion before you) 'tis a good Argument.

Sir, if this Precedent ſhall appear to Poſterity to be a Precedent of an Innocent Man, or a Perſon whoſe Guilt was doubted of, or one whoſe Guilt did plainly not appear, and this Bill ſhould be carried by a prevailing Party, I do agree it was a very ill Precedent: But if the Caſe be, that this Precedent will appear to Poſterity upon the Truth of the Thing, to be a Precedent made of a Man notoriouſly Guilty, of a Man that had deſerved this Extraordinary way of Proceeding, and this general Reſentment of the Nation, and that nothing could have hindered this Man from the Common Juſtice of the Nation, but his having endeavoured to elude it in this Matter, and if it appears that you would not be put off ſo, but that your Indignation made an Example of this Man, I ſhall not be ſorry it ſhould appear to Poſterity, but I believe Poſterity will (as I think they ought) thank you for it.

Sir, I do ſay for my own particular, while I am Innocent, I ſhould not think my Life in danger to be judged by 400 *Engliſh* Gentlemen, and the Peerage of *England*, with the Royal Aſſent; and when I reflect, I can't be of Opinion, That the Government could have procured a Parliament to have paſſed a

Bill of Attainder againſt my Lord *Ruſſel*, or Mr. *Cor-niſh*, or even Mr. *Colledge*: I don't think all the Power of the Government could have prevailed to have done that, although they could prevail to have them condemned by the Forms of Law; and here I ſee that a great many Gentlemen have oppoſed every ſtep of this Bill, for fear of making an ill Precedent; yet thoſe Gentlemen do believe in their own private Conſciences, that he is Guilty; and I can't think, that any Innocent Perſon can be in danger by ſuch a Bill, when Gentlemen oppoſe this Bill only upon the Prudential part, though they ſtill confeſs him to be Guilty.

The Concluſion I make for my ſelf is, That I am convinced in my Conſcience (which I think is ſufficient, when I Act in the Capacity I now do) that Sir *John Fenwick* is Guilty of High Treaſon, and that there are Reaſons ſo Extraordinary to ſupport this Bill of Attainder, that I do not ſee how any Perſon that is ſo convinced, can refuſe to give his Affirmative to this Bill.

Sir Godfrey Copley. Sir, I am very ſenſible a great deal hath been ſaid upon this Subject; but I think there is ſomething in Duty incumbent upon every Man, eſpecially upon me, who can't concur with the general Senſe of the Houſe, to give my Reaſons for my diſagreement; and I will make uſe of no Arguments but ſuch as I can't Anſwer my ſelf: A great deal hath been ſaid upon this Debate, by Gentlemen Learned in the Law; and many of theſe, though they have ſaid they would not ſpeak againſt the Power of Parliaments, yet the greateſt part of their Arguments have touched upon your Method of Proceedings; and to ſhew you how they interfere with the Rules of *Weſtminſter-Hall*, ſo great is the force of Cuſtom and Education; but I acknowledge ſome have brought us Arguments quite of another ſtrain.

I take the Puniſhment of Offenders to be one of the neceſſary Supports of all Governments, and all Societies

Societies of Men have laid down to themſelves ſome Rules, by which they judge whether Perſons accuſed, are Innocent or Guilty; therefore in a Matter of this Extraordinary Importance, it is proper to conſider what Rules we have to go by.

It is the Cuſtom and Law of our Nation to require two poſitive Witneſſes to prove Treaſon, and though I think without the utmoſt neceſſity it is not prudent to deviate from that Rule, yet I will not Argue from thence that we are tied up to it; no, it is moſt certain on the other hand, that the Legiſlative Authority, which hath Power, if they think good, to Abrogate all Laws now in being, cannot be tied up to any Rules of Humane preſcription. But, Sir, there are the Eternal Rules of Equity, and Juſtice, and Right Reaſon, and Conſcience; and theſe I think are unalterable, and never to be ſwerved from; and therefore I ſhall take the Liberty to ſee how far agreeable our Proceedings are to theſe Rules.

Sir, I look upon it as a Fundamental Breach of theſe Rules, for an Accuſation to be given in againſt a Man behind his back, by he knows not whom, or by any with whom he is not confronted and brought Face to Face.

I am one of thoſe that look upon Sir *John Fenwick* to be Guilty, and there is a Proof of it by one Witneſs; and to this you have added an Indictment that is proved. Now, I muſt needs own, that I think that to be ſo far from giving any Credit or Strength to the Evidence, that in my Opinion the Injuſtice which attends it, makes the Scales lighter than they were before. For if any Bill or Writing Sworn behind a Man's back, may be uſed as part of Evidence, I do by parallel Reaſon Argue, that the like may make up the whole, at one time or other; and then the Information of any two profligate Knaves before a Secretary of State, or a Juſtice of Peace, ſhall be ſufficient, without any Living Teſtimony, to make a Man run the hazard of his Life.

Then, Sir, I am not at all convinced of the Neceſſity of this Proceeding; I muſt confeſs that thoſe that brought this Matter before us, are much wiſer than I, and therefore I will not Examine what Reaſon they had to do it: But it is ſo little agreeable to me, I wiſh it had not come here. But is it to be ſuppoſed, that your Government is in hazard by any Man that is faſt in *Newgate?* Can any Man think that Sir *John Fenwick* can do any thing in his Condition to hazard it? Can you expect that a Man that hath been ſix Months in Priſon, and no body came at him, that he may make ſuch a Diſcovery as may be worth your while? But ſuppoſe you had a Man of Invention and Practice, what a Spur do you put to it? May not a Man of Parts, when he hath no other way to ſave himſelf, may not he form ſuch a Plot, as (ſhould it gain belief) might make the beſt Subjects in *England* tremble?

'Tis not Sir *John Fenwick*'s Life which I Argue for, I do not think it of ſo great Value, to deſerve ſo long and ſolemn a Debate in this Houſe, nor the Conſideration of ſo great an Aſſembly after this manner. But I do ſay, if this Method of Proceeding be warranted by an *Engliſh* Parliament, there is an end to the Defence of any Man living, be he never ſo Innocent.

Sir, I remember I heard it mentioned on the other ſide of the way, by an Honourable Perſon, who never lets any Argument want its weight; That King *James* Attainted a great Number of Perſons in a Catalogue, in a Lump. Sir, I am not afraid of what Arbitrary Princes do, nor an *Iriſh* Parliament; but I am afraid of what ſhall be done here: I am concerned for the Honour of your Proceedings, that it may be a Precedent to a future Parliament in an ill Reign, to do that which I am ſatisfied you would not do. I had ſome other Thoughts, which I cannot recollect, though theſe Reaſons are ſufficient to convince me.

Mr. Foley, the Speaker's Son. Sir, the Worthy Gentleman that ſpake firſt upon this Debate, calls me up: He

He ſaid, That he thought in this Matter, every one ought to give the Reaſons of his Opinion; and in giving the Reaſons of my Opinion, I do ſolemnly Proteſt, I do it with the ſame Sincerity as I would do, if I was upon my Oath, and of a Jury.

The Worthy Gentleman ſaid, That if there could be any danger from this Precedent, that an Innocent Man might loſe his Life, he would not be for it; I deſire that he would conſider, whether there be almoſt any Inſtances of any Innocent Men that have loſt their Lives, but what has proceeded from Precedents that have began upon Guilty Men. The ſame Gentleman told you, That if we did not believe Sir *John Fenwick* to be Guilty, no other Conſideration ought to move us to be for this Bill. Now the Reaſon I am againſt this Bill, is, becauſe it does not appear to me from the Evidence that hath been given at the Bar, that Sir *John Fenwick* is Guilty. And I do think, that which is not Legal Evidence, is no Evidence; and I do think, That all the Lawyers that have ſpoke in this Matter, have allowed it to be no Legal Evidence. And I deſire Gentlemen will conſider, if it has been thought unreaſonable that Men ſhould be convicted upon ſuch Evidence, Why now it ſhould be ſaid to be neceſſary? I think a Saying of my Lord *Strafford* upon his Tryal very applicable to this Caſe; If a Pilot was to direct a Ship in a dangerous Sea, and there was no Buoy to direct his Courſe, if he then ſplit his Ship, he was Excuſable; but if there was a Buoy up, then he was Accountable for it. Now, comparing our Government to the Sea, there have been many Rocks and Sands, and many Men have loſt their Lives by them, but the *Treaſon Bill* ſeems to be ſet as a Buoy to avoid that Miſchief for the future. Now, if we ſplit upon theſe Rocks, I ſhall think we are but ill Pilots.

Upon a former Debate we were told, We are not tyed up to the Rules of *Weſtminſter-Hall*, and it was ſufficient to juſtifie a Man in giving his Vote for this

Bill, That he was ſatisfied in his own private Opinion that Sir *John Fenwick* was Guilty: See the Conſequence of that, I do believe in my own private Opinion as much as any body that Sir *John Fenwick* is Guilty, but in Things that I have as much believed as I do this, I have found my ſelf miſtaken.

When a Jury acts according to Legal Evidence, that they have no Reaſon to miſtruſt, they are in no manner of blame: And if this Gentleman ſhould prove Innocent, when you have taken away his Life, and his Eſtate, and ruined his Family, all that you have to ſay for it is, That you have acted according to the beſt of your own Underſtandings, guided by your own private Opinion.

Were this the Caſe of Sir *John Fenwick* only, and I not to give my Vote; I reckon him ſo deſpicable, and becauſe I believe him to be a Traytor, and I think the worſe of him for the Part he hath acted ſince he was in Cuſtody, I ſhould not concern my ſelf about it. But when I ſpeak againſt this Bill, I ſpeak on the behalf of all thoſe that may hereafter ſuffer by ſuch a Precedent as this. Thoſe Precedents that have been urged, don't come near this Point. And though the Power of the Parliament is above that of other Courts, yet there hath been no Precedent that comes up to this, That we ſhould paſs a Bill to Attaint Sir *John Fenwick*, becauſe he will not give Evidence, or there is no Evidence againſt him. If Sir *John Fenwick* be to be Hanged, becauſe there is but one Evidence againſt him, any Man in the World may; and then I think every Man's Life depends upon it, Whether this Houſe do like him or not. Conſider what Opinion you your ſelves have of the Judgment of Parliament in Caſes of Election; I think if this Bill does Paſs, every Man's Life will be as precarious as his Election.

We have been told, how much Danger the Government will be in, if this Bill does not Paſs: I have as much Zeal for this Government as any Man; but

all

all the Government is concerned in it is, That a Man that you think a Traytor ſhould live. And I do think the Government is no more concerned in his Life, than in the Living of any *Jacobite* in *England*. But, on the other hand, I think the Lives and Liberties of the Subjects of *England* are concerned, and, by this Bill, you will make all their Lives and Liberties precarious.

I am not for bringing the Blood of Sir *John Fenwick* upon me, or my Poſterity; nor can I give my conſent to a Precedent for them to be Hanged without Evidence.

Lord Cutts. The Worthy Member that ſpake laſt but one told you, That he thought the Life of Sir *John Fenwick* was not worth the Conſideration of this Aſſembly; I do differ from him in that. If the Scripture tells us, That the moſt inſignificant Creature does not fall without God Almighty's Conſideration, I think the Life of a Gentleman may be thought worth ours.

The Worthy Gentleman that ſpake laſt told us, That he did believe in his Conſcience Sir *John Fenwick* to be Guilty: But becauſe he hath found himſelf Miſtaken formerly, when he believed Things with the ſame appearing Certainty, therefore he may be miſtaken now. I hope Gentlemen will not preſs an Argument upon our Judgments, from Precedents that are only Miſtakes: I do agree, That any Man may be miſtaken in a Thing which at that Time he thinks himſelf moſt certain of; but till that Miſtake appears, I ſay, it ought not to make him doubt of any Thing that he does clearly and diſtinctly perceive: If otherwiſe, there is an end of all Religion and Law; and it ſhakes the Foundation of the moſt certain Belief a Man can entertain.

As it appears to me, ſome Gentlemen ſeem to lay a greater ſtreſs on ſome Things than they deſerve, and are not pleaſed to anſwer ſome Arguments; and therefore I deſire leave to ſpeak to two or three Points,

in ſhort. I ſhall not ſay any thing of the Authority of Parliaments, it ſpeaks it ſelf; nor of the different Conſideration of our Proceedings, and that of Inferiour Courts, that ſeems to be agreed: But I ſhall apply my ſelf particularly to mention ſome Things upon Sir *John Fenwick*'s Caſe, and in that take care, as near as I can, not to trouble you with any Thing I have ſaid upon this Subject.

I can't but obſerve, That every Gentleman that ſpeaks againſt this Bill, begins with an Introduction that he believes him Criminal, which does ſomewhat aſtoniſh me; I hope they will Explain themſelves a little. But to the Point, as to Sir *John Fenwick*'s Caſe; I did take the Liberty in a former Debate to obſerve, That it was not only a Conſpiracy againſt the Lawful King of *England*, but alſo for the bringing in a Tyrannical and Foreign Power upon you. But there is one Conſideration I did not mention then, becauſe I thought what I ſaid carried ſo great Weight, it needed it not; I do ſay, not only as a Chriſtian, as an *Engliſh-man*, and as a Subject of this Government, againſt which he hath committed a Crime of the higheſt Nature: But I will ſay, as a Man of Honour, that he hath acted contrary to the Rules of Honour; I think Sir *John Fenwick* had made a much better Figure, if he had appeared in Arms in *Flanders*, where he might have Charged this Prince at the Head of his Troops, than baſely to have contrived his Death in this manner.

Sir, I have only one Thing more that I deſire to ſpeak to (for what I ſay, is more for my own Information than to decide any Man's Opinion further than he agrees with it: I ſay) moſt Gentlemen have likewiſe owned, That if they thought this an Extraordinary Caſe, they would be for this Bill. I do ſay, as it appears to me, I do think, if ever there was an Extraordinary Caſe, this is one; and if ever any Government was in Danger, this is, or may be, upon your Reſolution to Day. A great deal of ſtreſs hath been

been laid upon this Argument, That Sir *John Fenwick* is in Hold: I take that to be nothing; for they keep a Combination together ſtill. 'Tis by Rewards and Puniſhments that all Governments are ſupported. Robberies, that were ſo common in *France*, that you could not walk after it was dark, by Puniſhments they have brought it to that, That you may ride from one end of it to another, with a Purſe of Gold in your hand. And if you think it a Trifling Matter, That wicked Men that have ſuch Inclinations ſhould eſcape, I don't doubt but you may have Plots every day.

I don't doubt but this Gentleman knows a great deal that he hath never laid before you; I would not be thought to preſs it as an Argument that he ſhould be Condemned, becauſe he won't Confeſs; but I will be bold to ſay, if he does know of a great many Perſons that have been concerned in this Buſineſs; if he knows of a Riſing that was deſigned, when this Conſpiracy was to be Executed; (and it may be Executed ſtill, if Things ſhall be ripe for it) I ſay, though you keep him in Hold, it will be an Encouragement to them to go on in their Cabals, in buying of Arms, *&c.* I think the Matter before you is no leſs than the Fate of *England*, and the Fate of *Europe*, and of all your Poſterity; I am ſure it is: And give me leave to ſay to you one Thing that is Matter of Fact, There are thoſe Stories inſinuated abroad, and thoſe Matters of Fact aſſerted, with relation to a Conſpiracy, and reviling this Houſe, that are not fit for me to repeat. But your Enemies laſt Year, before the breaking out of this Conſpiracy, had the ſame ſort of Meetings, and the ſame ſort of Diſcourſe, as they have now. I will end with proteſting to you, That I deal with Sir *John Fenwick* with the ſame Candour and Honour, as I ſhall always deſire to be dealt with my ſelf.

Sir Godfrey Copley. That Noble Lord miſunderſtood my meaning, as to the ſmall Value I put upon Sir

John

John Fenwick: I meant, That Sir *John Fenwick*, conſidered as a Private Perſon, accuſed in another Place, it was not worth while for this Houſe to act in their Legiſlative Capacity upon him.

Sir Charles Carteret. I think this Bill is of very great Moment, and ought well to be conſidered before it Paſſes; for when it is paſſed, it will be too late to retrieve the ill Conſequences which may attend it: There is ſo much Roguery in the World, I think it a hard Matter to arrive at the Truth. 'Tis not long ago there was a Plot contrived by one *Young*, and others, againſt the Biſhop of *Rocheſter*, and ſo cunningly contrived, that if a Bill of Attainder had been brought in againſt the Biſhop of *Rocheſter*, before the Truth had been diſcovered, I do not know what might have been the Conſequence of it. I ſuppoſe no body queſtions the Truth of this Plot; but God forbid that every body that hath been named for it ſhould be Guilty. It may be true, That there was ſuch a Meeting that Sir *John Fenwick* is Accuſed of being at, and yet Sir *John Fenwick* might not be there; and I do not think it ſufficiently proved, and therefore I can't give my Conſent to this Bill.

Mr. Manley. Sir, I have, as well as I could, attended to your Debate in this Matter; and I did not trouble you in the laſt Debate, becauſe I was willing to take all the Opportunities I could to inform my ſelf.

'Tis to me an extraordinary Thing, not only for the Matter, but the Manner of your Proceedings, which, conſidering all Circumſtances, appears to me to be not only not Common, but Unprecedented; and as we are all in this Matter Judges, ſo I hope we ſhall apply our ſelves to conſider of it with that Temper, as may lead us to give a right Judgment. And if I had never ſo great Obligations upon me, and Dependence, though from the Crown, I would lay them by, at leaſt they ſhould not influence my Judgment in this Matter. We are to paſs Judgment in a Matter of Life and Death upon this Perſon, and 'tis urged

urged we ſhould do it, becauſe the common Courſe of Juſtice will not reach him for the Crime objected againſt him, which is High Treaſon, The Species of that Treaſon as it is laid in the Indictment is, *&c.*

Sir, the Evidence that hath been given to ſupport it, hath been the Affirmation of a ſingle Witneſs at the Bar: Indeed other Things have been alledged in the Bill; but as hath been ſaid in *Weſtminſter-Hall* upon another Occaſion, They look only like Pepper and Salt to me; for in themſelves they are not Crimes (I ſpeak with ſubmiſſion to your Judgment) at leaſt to bare Company with an Accuſation of High Treaſon.

As to the Evidence; firſt, Capt. *Porter* tells you, That Sir *John Fenwick* was at a Meeting at the King's Head, and at Mrs. *Mountjoy*'s afterwards, when there were Treaſonable Diſcourſes amongſt them, and *Charnock* was directed to go into *France*; but the End of that is not proved: For the Witneſs that told you of thoſe Meetings, did not tell you, as I obſerved, that *Charnock* did go to *France*; and what he ſaid upon other Occaſions, is no Evidence to me. And though we are not tyed up to the Rules of *Weſtminſter-Hall*, I am ſo young a Member, I know not what Methods are obſerved in Parliament, that I may in ſome meaſure make them a Rule to me.

The Law of *England* requires two Witneſſes upon the greateſt Reaſon; and 'tis not only the Policy of *England*, but the general Conſent (in this Caſe) of the whole World, and it is grounded upon the Law of God. A Gentleman ſaid the other day, the Law of God required two Witneſſes, and a Gentleman who is very near allied to one, from whom he might have early informed himſelf, made us a Challenge, to ſhew him where it was to be found: If he will look into *Numbers* and *Deuteronomy*, there are three particular Texts very plain in it. The Reaſon of this is illuſtrated in the Story of *Suſannah*, her Safety depended upon it; and the Jews, when they proſecuted our Saviour,

Saviour, though they wanted no Malice, nor nothing to animate them, to put him to Death; yet, St. *Matthew* tells us at laſt, there were two Witneſſes found againſt him; and this being the Law of the Land, and the Law of God, it muſt be my Rule. I muſt have this Matter proved againſt Sir *John Fenwick*, as fully as the Law of the Land, and the Law of God requires. The other Evidence brought to maintain this Bill, is what is Sworn by *Goodman* before a Juſtice of Peace, and the Account of the Evidence given by *Goodman* to the Grand-Jury, which I muſt confeſs I declare I am very far from being convinced ought to have Weight with us: But, I think, they muſt lay a great Weight upon it, who gives their Vote for this Bill, or otherwiſe they muſt give their Vote upon the Teſtimony of one Witneſs.

The Reaſon for this Extraordinary Proceeding is, 'tis urged, there is a Neceſſity for it; the Plot will be loſt elſe, ſay ſome; Sir *John Fenwick*, ſay others, will eſcape elſe. As for the Plot, I wiſh to God there were no ſuch Perſons; but 'tis probable the beſt way of ending this Plot would be, if His Majeſty in his Wiſdom thought fit, to interpoſe with his Mercy and Grace at this Time; and better than for the Legiſlative Power, in an extraordinary Manner, to take off a Perſon againſt whom there is not a Legal Evidence. Gentlemen ſay, they are convinced in their Conſciences; but I will appeal to their Conſciences, Whether there be Legal Proof againſt him: And ſhall we then interpoſe, in an extraordinary manner, to take away his Life?

No Man pretends to Anſwer, but that this Proceeding may be dangerous to Poſterity; if we had any Security this might be done without that Danger, it might be ſome Encouragement to Gentlemen to come into it: But ſince it may be dangerous, are not we, who are entruſted by the People, to have an equal Care of the Liberty of the People? We are to take Care of His Majeſty's Life and Government; and

and the Reaſon is, becauſe upon him, and his Government, the Publick Safety does depend. 'Tis *Salus Populi*, is the great Reaſon that the Law takes ſuch Care of the King; and as we are to do nothing to the detriment of the King, ſo we are to do nothing for the King that may be of detriment to the People.

An Honourable Lord hath been pleaſed to ſay, We are not yet out of Danger: I am ſorry to hear it, and could not think it, when ſo Noble a Lord is ſo near the King, and hath ſo great a ſhare in taking Care of the Publick Safety. But ſure nothing can happen from this Perſon; there hath been care taken he ſhould have no Converſation with any Body: If I thought there was a Hazard to the Government, or to the King, and no way to ſecure us, but taking away this Gentleman's Life; ſuch a Reaſon as that would make me go Counter to my own Reaſon and Judgment. But I can't be of Opinion, That a Man of Sir *John Fenwick*'s ſize, who in his beſt Circumſtances indeed, is a Gentleman by Birth, and hath a Gentleman's Fortune, but is now in a great meaſure without his Eſtate; ſo his Fortune can't do any hurt, and his Alliance I ſuppoſe is not Conſiderable enough to do any neither.

Then as his Circumſtances do not make him ſo Conſiderable, as to do us any hurt; let us take care that we do not, in the Caſe of his Blood, wound our ſelves.

Gentlemen lay but little ſtreſs upon the dangerouſneſs of the Precedent, I do lay more; and 'tis chiefly upon that Reaſon I can't come up to be for this Bill. I would not that ſo good a Parliament ſhould lay the Foundation, by which in after Ages the beſt Men in *England* may ſuffer; 'tis ſaid, An ill Parliament will not want a Precedent, but will make uſe of their Power: But they will fall ſooner into it, if led by a good Parliament.

Sir,

Sir, this is a Matter I would not have preſumed to have troubled you in; for I can't think any Thing I can ſay, will have any Weight with any one that is not of my Opinion: But as an *Engliſh-man*, and I have the Honour to be of this Houſe, when a Thing of this Nature comes before us, and I am to give my Opinion as a Judge in it, I was willing to give my Reaſons for my Opinion. I think this Bill is unprecedented; and you will give me leave to ſay, it appears to me to be unreaſonable. I think it contrary to the Fundamental Rules of Reaſon and Juſtice; I doubt it may be dangerous to our Conſtitution; and I fear future Ages may have Reaſon to Repent what we do. And therefore I am againſt this Bill, and I hope it will not Paſs.

Sir Will. Strickland. Sir, I do aſſure you I ſhall not in any Thing of this Bill, or any Thing elſe, run counter to my Conſcience or Judgment: But I do think, and I think few deny it, I do think in my Conſcience that Sir *John Fenwick* is Guilty; and thinking him ſo, I ought to condemn him. I do think if we ſhould ſpare this Gentleman for want of Form, as they call it, now we are in our Legiſlative Capacity, and there ſhould be any ill Effects of it; and other People, by thinking they might avoid Puniſhment by the Forms of *Weſtminſter-Hall*, ſhould have the like Imaginations againſt His Majeſty, and they ſhould take Effect, I ſhould think my ſelf in a great meaſure Guilty of that Misfortune. I think the Kingdom is concerned, and the King's Preſervation, in this Bill; and I hope you will Paſs it.

Mr. Dolben. Mr. Speaker, I am againſt the paſſing this Bill, and ſhall, with as much Brevity as may be, lay before you the Reaſons why I am againſt it; and probably I ſhould not have troubled the Houſe with them, (in regard I was not preſent at the ſecond Reading of the Bill) but that I think it neceſſary to juſtifie my Opinion in a Caſe of this Importance.

I admit

I admit that the Fact charg'd upon Sir *John Fenwick* is an Overt-Act of High Treaſon within 25 of *Ed.* 3. though I muſt take leave to ſay, That a Judgment upon a Caſe at leaſt as ſtrong as this, has lately been much Controverted and Arraigned: However, I am told, that thoſe Authors, whoſe Opinions in that Caſe were ſo ſtreight-lac'd, have thought fit to enlarge their Notions, with reſpect to the Caſe now before us. But it is not my intent to Diſpute the Nature of this Fact; for, I am perſwaded, that to conſult how to procure an Invaſion upon the Kingdom with Foreign Force, is an Overt-Act of Compaſſing and Imagining the Death of the King. And I think the Charge contained in this Bill againſt Sir *John Fenwick* amounts to ſuch an Overt-Act. But I beg leave to reflect, How far Overt-Acts of this Nature, which fall directly within any Species of Treaſon mention'd in 25 *Ed.* 3. I ſay, I deſire it may be conſidered, how far *ſuch* Treaſons are cognizable in Parliament. That they are cognizable by the Abſolute Supream Power of Parliaments, there is no doubt. But *Power* is to be underſtood in Caſes of this Nature according to the Law-Maxim, *Id poſſumus quod jure poſſumus.* And therefore the Queſtion will be, Whether Treaſons of that kind are cognizable here, within the intent and meaning of the Law of 25 *Ed.* 3? Now, I take it, that Statute was made, in order to be the certain Rule and Standard whereby to judge of Treaſons; not only, as to the Matter of them, what ſhall, from thenceforth be held Treaſon, what not; but likewiſe as to the way and manner of Determining Treaſon, with relation to the Judicature. That is to ſay, How far, and in what Caſes *the Juſtices* may proceed to Judgment; and what Caſes are reſerved to the Judgment and Cognizance of *the Parliament.* And this Diſtinction in point of Juriſdiction will (I think) appear very plainly upon conſideration had of the Words of 25 *Ed.* 3. That Statute firſt enumerates ſeveral Species or Branches of Facts, which it ſays ſhall be adjudg'd

High

High Treaſon; that is, by the Juſtices. Then, it goes on, and ſays, *If any other Caſe ſuppoſed Treaſon, not ſpecify'd in that Act, doth happen before any Juſtices, the Juſtices ſhall tarry, without any going to Judgment of the Treaſon, till the Cauſe be ſhew'd and declared before the King and his Parliament, whether it ought to be judg'd Treaſon or Felony.* That is, or a Crime of a different Nature, (for in the Old Books, *Felony* imports any heinous, profligate Offence.) This, with Submiſſion, is to me, a Demonſtration that the Intention of the makers of this Law, was, That ſuch Treaſons as came directly under any of the Heads enumerated in the Statute, ſhould be left, and be appropriated to the Deciſion of the Inferiour Courts: But, that Facts of another Complexion, not reducible to any of the Particulars enumerated, ſuch as Enormous Offences, and misbehaviour of Magiſtrates and Great Men, or of Corporations, Companies, and the like: Thoſe indeed ſhou'd be reſerv'd to the Judgment and Cenſure of the Parliament, who alone are a Match for Powerful over-grown Offenders, whom the ordinary Juſtice of the Kingdom cannot grapple with. And as this ſeems plainly to be the Intention of the Act, ſo, I think, the Inſtances have generally been purſuant to that Intention. For I know but of one ſingle Inſtance where a Perſon has been Attainted by Bill for no other Treaſon than what is within 25 *Ed.* 3. And that Attainder was afterward revers'd by Act of Parliament, as I ſhall preſently make appear. 'Tis true, where Perſons have been out of the reach of the Law, in open Rebellion, or fled from Juſtice, the Parliament has ſometimes thought fit to interpoſe, and Attaint them; as in the Caſe of Sir *John Mortimer*, and others, who made an Eſcape out of the Tower; and the Caſe of ſuch of the *Regicides*, who were either dead, or fled from Juſtice, (for ev'n of thoſe villanous Offenders, none other were Attainted by Parliament, the reſt being left to the ordinary Proſecution) likewiſe the Caſe of the Duke of *Monmouth*,

Monmouth, who being in open Rebellion, was ſo Attainted. But I ſay, I have not met, upon the beſt ſearch I cou'd make, more than one Precedent of a Perſon in Cuſtody, Attainted by Bill, for ſuch Treaſon only as is within 25 *Ed.* 3. And that was the Caſe of *Hall*, Attainted for adhering to the King's Enemies. (For tho' Lord *Cromwel* and others were alſo in Cuſtody, yet their Bills of Attainder were grounded on other Matter, and not upon the Statute.) But, to go a ſtep farther, I think I may confidently affirm, there is not ſo much as one Precedent where a Perſon, who not only was in Cuſtody, but had been actually proſecuted in the Ordinary Method, had been Indicted, Arraign'd, had joyn'd Iſſue with the King, and that Iſſue was to have been Try'd by the Verdict of Twelve Men, in order to the Acquittal or Conviction of the Priſoner; where, after all this Proceeding, ſuch Perſon was taken away from his Tryal, and debarr'd the benefit of the Judgment of his Peers, the benefit of his Challenges, the benefit of his Exceptions to the Indictment (if inſufficient) and cut off extrajudicially by an Act made on purpoſe, *Ex poſt Facto*. I muſt declare, I never met with any Inſtance of this kind, nor indeed with any thing in any ſort parallel to it, ev'n in the moſt Tumultuous Times, unleſs it be the Caſe of my Lord *Strafford*: And I believe no body that reads the Preamble of the Act for Reverſing his Attainder, will rely upon that Proceeding as a Precedent for what we are now a doing. In the Preamble it is ſaid, That *the Turbulent Party did attempt the procuring of that Act, on purpoſe to Condemn him, ſeeing no hopes to effect their unjuſt Deſigns by the Ordinary Method of Proceeding*. This ſhews the Opinion of our Predeceſſors concerning courſes of that Extremity. They eſteem'd it contrary, not only to the Fundamental Laws of the Realm, but ev'n to the Fundamental Rules and Principles of Common Juſtice (by which certainly Parliaments ought to be govern'd as well as Inferiour Juriſdictions) That when a Perſon

had been under Proſecution by the Ordinary Method (as the Caſe was of that Noble Earl) he ſhou'd afterward be wreſted from that Proſecution, and made a Sacrifice by an Extraordinary way of a Bill of Attainder, becauſe by the Ordinary way that had been begun, the Deſign againſt him cou'd not be effected. And as great Diſcountenance has been put upon other ſuch-like unjuſt Bills of Attainder in preceding Times.

In the Reign of *Edw.* 3. *Roger Mortimer* was Attainted by Parliament, but afterward, in the ſame Reign, his Attainder was Revers'd, and the Reaſon declar'd, becauſe *he was Attainted againſt the good Laws and Cuſtoms of the Kingdom.* So the Caſe of *Hall,* whom I mention'd before, as the only Perſon (within my Obſervation) who being in Cuſtody, was Attainted by Bill, for Treaſon within 25 *Ed.* 3. his Attainder was likewiſe Revers'd, with this Solemn Declaration, That, for the future, *Touts Trials ſeront ſolonque les bons leys del Realm.*

Another Attainder there was of Sir *Thomas Haxey,* which was alſo Revers'd, and declared to be againſt Law. Then, there are the Attainders of *H.* 8's Time, which I ſhan't particularize. But I beg leave to make this Obſervation upon them in the general; That not only all the Hiſtories of thoſe Times, and our Law-Books condemn them as moſt groſly contrary to Law and Juſtice, but the Statute of 1 *Ed.* 6. *c.* 12. ſeems (in my Opinion) to have been directly levell'd at thoſe Attainders in the Reign immediately preceding. For it ſays, That the Proceedings in King *H.* 8's Time were grounded upon Laws that were *Extream and Terrible:* And therefore that there might be no more ſuch Terrible Proceedings for the Time to come, it reduces all Treaſons to the Ancient Standard of 25 *Ed.* 3. and goes on, and Enacts, That no Man ſhall be Convicted or Condemn'd for Treaſon, but upon the Teſtimony of *Two Lawful Witneſſes.* Now I take this Law to be ſo general, as to extend to all Con-

Convictions and Condemnations for Treaſon, of what Nature ſoever they be, and conſequently that it muſt extend ev'n to Bills of Attainder, ſince thoſe are the Higheſt and moſt Powerful Convictions and Condemnations.

The Preamble I juſt now recited, is an Argument for this Opinion, *Becauſe Perſons were condemn'd in the former Reign by Laws that were Extream and Terrible. Therefore be it Enact'd, That none from henceforth ſhall be condemn'd, but only upon the Teſtimony of two* Lawful *Witneſſes.* So that every Law which Condemns a Perſon for Treaſon, otherwiſe than upon the Teſtimony of two *Lawful* Witneſſes, is a Law *Extream and Terrible*; and therefore entirely oppoſite to the Direction of this Act. Let us then ſee whether the Bill of Attainder now before us, be ſupported by ſuch Evidence as that Statute requires. There was indeed one Witneſs, and (for ought appears to the contrary) a Lawful one produc'd: But inſtead of another, the Counſel have produc'd a Record, to which Sir *John Fenwick* is no Party, and the Depoſitions of a Perſon who never was croſs-examin'd, nay, whether he be living or dead, *non conſtat*. I have not heard it affirm'd by any Gentleman who has ſpoke for the Bill in this Debate, That ſuch ſort of Proof is equivalent to a ſecond Witneſs. But in Anſwer to the Objection of two Witneſſes being neceſſary in this Caſe, two things have been ſuggeſted. Firſt, 'tis ſaid, That this Rule of Evidence, though eſtabliſh'd by an Act of Parliament, do's not oblige us here, becauſe this Houſe is part of the Legiſlative Authority, which no Law can bind. Sir, that Aſſertion is undoubtedly true, with this diſtinction. 'Tis moſt certain the Legiſlative Authority cannot be ſo far bound by Laws, as to be fore-clos'd of the Power of *Repealing* them. But, under favour, whilſt the Laws continue unrepeal'd, every Branch of the Legiſlative is as much bound by 'em as Inferiour Powers and Authorities are bound: And therefore I can't agree

with the Gentleman who ſpake laſt, That what the Laws require, as to Evidence and Tryals, is only *Form.* Sir, Forms are in their Nature things meerly Diſcretionary, and are ſo far from binding this Houſe, that they are alterable ev'n at the pleaſure of the Courts where they are practic'd, as frequent Experience ſhews. But the requiſites of a Statute are of another Nature; thoſe have been always underſtood to be not Forms, but *Rules*, which (whilſt the Statute is in force) are binding every where, to all Powers and Authorities, the King himſelf not excepted. And this is the Lord Chief Juſtice *Vaughan*'s Diſtinction, That though we be not bound by the Forms of Law, yet we are unqueſtionably bound by the Rules of Law. And ev'n in this Caſe of Sir *John Fenwick*, every body allows we are bound by an Act of Parliament, as to the *Nature of the Fact*. We all Judge the Fact charg'd upon him to be High Treaſon, becauſe 'tis an Overt-Act of Treaſon within the Statute of 25 *Ed.* 3. Why then is not our Judgment as much bound to the other Act, with reſpect to the *Proof and Evidence* of that Fact? If 25 *Ed.* 3. be ſo far binding to us, as to preſcribe us a Rule, whereby we muſt determine in Caſes of this Nature what is *Treaſon*, and what not; why ſhall not the Statute of *Ed.* 6. be equally binding in preſcribing us a Rule, whereby to determine what is *Evidence* of Treaſon, and what not?

The other Thing ſuggeſted by way of Anſwer to the Objection of Defective Evidence, is, That if a ſecond Witneſs be wanting in this Caſe, that want is occaſion'd by the Practice of Sir *John Fenwick*, or his Agents, by cauſing *Goodman*, who was the ſecond Witneſs, to withdraw. This is indeed ſuggeſted, but will any Gentleman ſay it has been prov'd? Has any Evidence been produc'd, that Sir *John Fenwick* or his Agents were Guilty of that Practice? So far from it, that the Bill does not charge *Goodman*'s withdrawing on Sir *John Fenwick*, or his Agents. It only ſays,

Whereas

Whereas Cardel Goodman, *one of the Witneſſes againſt Sir* John Fenwick, *is withdrawn, ſo that he cannot be had to give Evidence*; and then follows the Attainting part. So that you are going by this Bill to Attaint one Man for another Man's fault: Becauſe *Goodman*, who might have been a Witneſs againſt Sir *John Fenwick*, is withdrawn, Therefore be it Enacted, That Sir *John Fenwick* ſhall be hang'd, though it be neither prov'd nor charg'd that the withdrawing was by the procurement, or ſo much as with the privity of Sir *John Fenwick*, or his Friends. Is this Parliamentary Juſtice? But I will ſuppoſe, for Argument-ſake, that Sir *John Fenwick*, or his Agents prevail'd with *Goodman* to withdraw, what ſhall be the Conſequence of that? Shall it therefore follow, that Sir *John Fenwick* muſt immediately be put to Death? God forbid! I think there is no parity between the Crime of Seducing away a Witneſs, and the heavy Judgment of Death. A more Reaſonable and Natural Inference may be this: That becauſe Sir *John Fenwick* has tempted away a Witneſs, therefore make a Law, that the Depoſitions of that Witneſs ſhall be of as good Force and Efficacy againſt Sir *John Fenwick*, as if the Witneſs were here, and gave Evidence *Viva voce*. I ſay, this is the more juſtifiable proceeding of the two; for by this means you will not take from the Priſoner the benefit of his Tryal by his Peers, nor the benefit of his Challenges, nor of his Exceptions to the Indictment (if it prove inſufficient) all which are his undoubted Right, whereof he is totally depriv'd by this Bill. Sir, I deſire to make one Obſervation concerning Bills of Attainder in general, which methinks ſhou'd reſtrain us from being very forward to puſh them on. Theſe Bills (like *Syſiphus*'s Stone) have frequently roll'd back upon thoſe who were the chief promoters of them. Of this, the Lord *Cromwel*'s Caſe is a known Inſtance: That Lord was the firſt who advis'd this violent Proceeding in *H.* 8's Reign. And 'tis the Obſervation of great Authors, That the

Advice he gave his Maſter to the Ruin of others, prov'd, not long after, Fatal to himſelf.

Sir, upon the whole Matter, this being the laſt time we ſhall have an Opportunity of Conſidering this Important Caſe, I muſt take the Liberty to declare freely my Opinion, That if I conſent to the Paſſing this Bill againſt Sir *John Fenwick*'s Life upon any other Grounds than what are entirely Juſtifiable by the Laws of God and Man, I am Guilty of the Death of Sir *John Fenwick*. I am not ſatisfy'd I can give my Conſent to this Bill upon thoſe Grounds, becauſe it is contrary to 25 *Ed.* 3. which intends that all Treaſons therein ſpecify'd, ſhall be Try'd in the Courts below by the Juſtices. 'Tis contrary to the Statute of *Ed.* 6. which requires Proof of Treaſon by two Witneſſes, contrary to the Act for Reverſing the Lord *Strafford*'s Attainder, which utterly condemns the proceeding by Bill after a Proſecution begun in the Ordinary Method (which Act is undoubtedly grounded on the Fundamental Law of our Conſtitution.) And laſtly, 'Tis contrary to Natural Juſtice, That a Man ſhall be Attainted of High Treaſon by Bill, when there is not one Word in the Bill whereby it appears that either he or his Agents are in the leaſt Guilty of what is alledg'd as the main Reaſon and Juſtification of the Bill. So that, in a Word, Becauſe this Bill of Attainder flies in the Face of Statute-Law, Common Law, and Common Juſtice, therefore I am againſt it.

Sir Edw. Seymour. Mr. Speaker, you all know I have born my Teſtimony againſt this Bill, being not perſwaded that it is juſt. Now we are come to the finiſhing part of it: And I ſhall lay before you thoſe Reaſons that prevail with me, and ſubmit them to the Judgment of the Houſe; and if I am more tedious than I uſe to be, I hope the occaſion is ſuch, that you will Pardon me; for I will endeavour to contract my ſelf in as near a compaſs as I can.

I ſhall

I ſhall not trouble you with any Arguments that have been laid before you already; nor ſhall I enter into the Examination of Precedents; a great many have been laid before you, and a great many of them have been Reverſed, moſt of them; and the Reaſon why they have been Reverſed was, becauſe the Perſons Condemned, have not had the due benefit of the Law: And if that be a good Reaſon for Reverſing of ſuch an Attainder, 'tis a good Reaſon why you ſhould not do it.

I can't but take notice, That the beginning of this Bill in the Houſe of Commons is the firſt ſtep of this kind, that hath been made in Parliament, except that of the Duke of *Monmouth*; and the Reaſon of it, I take to be this, becauſe you hear not upon Oath; you Condemn not upon Oath: You, nor the Party under Accuſation have that Advantage againſt a forſworn Evidence as there is in the other Houſe; the Method has been to paſs ſuch Bills in the Houſe of Lords, and tranſmit them hither, upon which you then Judge.

I think, in this Caſe, you have no Evidence; and inſtead of two Witneſſes, you have no Witneſs at all; for as to *Goodman*, *De non apparentibus, & non exiſtentibus eadem eſt ratio.* As to *Porter*, he hath been Examined; but when you conſider that he was a Perſon engaged in this Conſpiracy, and that he had no Repentance of his Crime till he was diſcovered, and then he comes to be an Evidence; how far that ſhall ſway with you, I ſubmit; but thus much I may ſay, every Man muſt allow me, that in far leſs Caſes no Man that does ſwear for himſelf, or upon his own Account, is to be admitted as an Evidence. If a Robbery be committed in an Hundred, though a Man be but to pay a Groat towards it, he ſhall not be an Evidence; how much more then in this Caſe, when a Man comes to ſwear to take away another Man's Life to ſave his own; for he is not in the condition of a Freeman, who gives his Evidence without Check or Controle, but he is drudging on for his Pardon, as

the Counſel told you, which depends according to the Evidence he does give or not give.

For my part, I can't go ſo far as ſome Gentlemen have done, to ſay, Sir *John Fenwick* is Guilty; for where there is no Law, there is no Tranſgreſſion; a Man that is guilty, muſt be guilty according to the Law: And the Law hath required and ſaid, That there ſhall be no Treaſon but what is proved by two credible Witneſſes, and here it appears that you have not one. The ſame Law that calls it Treaſon, ſays, it ſhall be ſo proved; then if you paſs this Bill, you make that Treaſon which before was not Treaſon.

Sir, the Law does require two Witneſſes, and there is Divine Authority for it too: It hath been hinted at, the place in *Numbers*, *No Man is to die upon ſingle Evidence*; and it ſays, *Theſe are the Statutes you ſhall obſerve throughout your Generations and Dwellings:* But I will go a little further, becauſe a Worthy Gentleman declared, there was no ſuch Law of God. He will find in the 19th. of *Deuteronomy*, a Caſe juſt as 'tis here; for the Caſe of High Treaſon was Idolatry at that time, and the Law ſays, *Whoſoever ſhall ſet up Idols, ſhall be ſtoned to Death*; but it ſays, *No Man ſhall be Condemned to die by the Mouth of one Witneſs, but by two or three Witneſſes he ſhall ſuffer*; I think this is poſitive enough. I ſhall not trouble you with more Inſtances, though I could repeat ſeveral.

Sir, the Law injoyns Forms ſtrictly, even to the leaſt Circumſtance; if a Man be Condemned to die, and after he is Condemned to die, another without Authority take away the Life of that Man, 'tis Murther. I will go further, if a Man be Condemned to be Hanged, Drawn and Quartered, if the Officer that is to do Execution, Shoot him, it is Murther in him; ſo that Men are not left to a Diſcretionary Power to Act according to their Conſciences.

I take the Reaſon by which this Bill is ſupported, to be deſtructive to all Humane Society; for if that

be

be admitted, that a Man ſhall Act according to his Conſcience, and not according to the Rules that are preſcribed him, I know not who is ſafe; for how can an Innocent Man make his Defence upon that Principle? It is a ſafe Conſideration for them that take upon them that way of Judging, becauſe they are bound by no Rules, but what hath not that done almoſt within Memory? *Felton*, that killed the Duke of *Buckingham*, what was his Juſtification, but he was perſwaded in Conſcience he did well in ſo doing? *Raviliack*, that killed *H.* 4. in *France*, he juſtified the ſame by his Conſcience, and that he had done a good thing; and I may ſay, this Argument of Conſcience hath Acted all the Villany of the laſt Age, and I am afraid hath gone a great way to diſturb the Happineſs of this.

For if this be a Rule to this Houſe, How is the King bound? I thought he had been bound by Law; but if this ſhall be admitted as an Argument, 'tis enough to ſay, if this Houſe be Arbitrary, the King is. I do not Reflect upon this Reign; but it will be enough to ſay, though he Act againſt Law, and turn Twenty Colledges out of Doors, his Conſcience perſwaded him to it. We ſee how unbounded the Liberty the Lords take, is, they are become Maſters of all our Eſtates; and I would be very loath for my Eſtate to depend upon the feeble Tenure of a Lord's Conſcience.

If then, this be the Caſe, as it is according to this Method, I deſire to know into what Condition we ſhall bring our ſelves?

You have been told, it is expected from you by your Country, that you ſhould Exert this Authority and Power: Sir, I would have been glad that in Caſes more reaſonable, we had Exerted the Authority and Power of Parliament; I wiſh it had gone to the preventing the debaſing and abuſing your Coin; I wiſh it would be Exerted, that we might not ſee our ſelves Cheated under Countenance of an Act of Parliament;

but

but contrary to that, you are fond of being ſprinkled with the Blood of Sir *John Fenwick*. As long as the Government is not in danger, I believe the Country would be glad that their Blood might run ſecure in their Veins, and not be tapt upon every occaſion to ſerve a Turn; for if you break the Laws, what Man can promiſe himſelf Security?

We know the Conſequence, if this Bill does not paſs, Sir *John Fenwick* may live in Miſery all his Time.

But what this Precedent may make, no Man can foreſee. This Bill is againſt the Law of God, againſt the Law of the Land; it does Contribute to the Subverſion of our Conſtitution, and to the Subverſion of all Government; for if there be Rules to be obſerved in all Governments, and no Government can be without them, if you ſubvert thoſe Rules, you deſtroy the Government. And therefore for theſe Conſiderations no body will think it ſtrange, if I give my Negative to this Bill.

Mr. Chanc. of Excheq. Sir, the Gentleman that ſpake laſt, hath carried the Reaſon againſt this Bill a little further than ſome others; for it ſeems now, we are not to reject the Bill for want of one Witneſs that is Legal in *Weſtminſter-Hall*, but it ſeems there is no Evidence at all; and by Capt *Porter*'s not being Pardoned, and yet *drudging* for his Pardon, as to all that have been Condemned upon his Teſtimony, he hath Arraigned the Evidence as not ſufficient, and hopes that will be the Judgment of the Houſe upon this Bill. I think if the Houſe reject this Bill upon that Argument, it will go further than many mean that oppoſe it.

Another thing he ſays; he compares the Convictions that I have upon my Judgment, and of every body elſe who ſpeak from the Proofs that are made, that he is Guilty to the Whimſies of two or three Mad Men, whereas we go according to the Evidence brought at the Bar. We don't go upon the Whimſies

of

of *Raviliack* or *Felton*, but upon the Proofs that have been made here; and though there are not two Witneſſes, yet upon what appears in Proof, I am convinced that he is Guilty; and upon that Conviction, I think, according to the Duty I owe my Country, and the Conſtitution of *England*, when a Bill does come to puniſh the Man whom I think Guilty, I think I ought to be for the Bill. As to what is ſaid out of *Deuteronomy*, That the Law of God was againſt it, if you will Argue *à Fortiori*, 'tis literally true, in the Caſe of Murther; but whether Murther or Treaſon, there is the Life of a Man concerned, and 'tis not the Puniſhment whether to be Hanged, or Hanged, Drawn, and Quartered, that makes any great difference; and give me leave to ſay, if you go to make Precedents from the Jewiſh Law, then I ſay, the Law of *England* is againſt that Law, in Caſe of Murther; and by the ſame Reaſon you may deſire leave to bring in a Bill to Repeal all thoſe Laws.

Sir, if this was the Eternal Law of God and Man, where was this Eternal Law in *England* before *Ed.* 6. Time? If it be the Eternal Law that there muſt be two Witneſſes, Why does it not hold in *England* even in ſome Caſes of Treaſon to this Day, I mean the Treaſon of Clipping and Coining? So that the Nature of theſe Faults are what the Law of every Country Ordains, and that is the Law.

And the Way of Evidence and Proof too differs in every Country; and I may affirm, That there never was any Goverment in which there was not a Power lodged ſomewhere to be Exerted upon Extraordinary Occaſions, beyond the Common way of Proſecution.

I don't care to Travel into the ſeveral Countries to ſee how their Conſtitution is, but I believe there is not one Place in *Europe* in which it is ſtrictly neceſſary there ſhould be two Witneſſes to take away the Life of a Man, but it is generally ſo as it is here in all Ordinary Caſes; but in this Caſe, this laſt Law does not

not go upon two Witneſſes, for you have a Proviſo in it does abſolutely except Proceedings in Parliament. I do not inferr from thence, that you ſhould not have two Witneſſes, if you proceed by way of Impeachment, I think you ought, and ſo for having Witneſſes upon Oath, *&c.* When theſe Proceedings are in Parliament, there is a direct Proviſo by which the Parliament is Exempted from thoſe Rules. Upon the whole Matter, I think this Man is Guilty. I think the Precedent would be more fatal, to ſay, that a Parliament can't proceed in ſuch a Caſe, than that a Guilty Man ſhould Suffer. I think this Bill comes before you with more Circumſtances, and Reaſon to juſtifie it, than any that hath been brought here before. Here is a Bill found againſt him by his Country, the Evidence of his Friends having tampered with one of the Witneſſes, confirmed by a Jury, *&c.*

A Learned Gentleman ſays, he would come up to make this Paper Evidence (but can't come up to make ſuch a Law) by which every other Man that is concerned in that Depoſition would be affected; but here is ſomething particular in this Caſe, a Man that hath been abroad, and hath not uſed the like Artifice, I think you ought not to uſe the like Power to Puniſh him that is not Guilty of the like Crime. And therefore I ſhall conclude. But I muſt take notice of one thing, it was ſaid, That this was the firſt Precedent of this kind begun in this Houſe, but that of the Duke of *Monmouth*; but I believe, if this Bill of Attainder is not to be begun in this Houſe, 'tis not to be brought in at all; for I believe there is a Statute, That the Life of a Commoner is never to be meddled with by the Lords Originally. I will not trouble you any further, I do in my Conſcience think that Sir *John Fenwick* is Guilty, and therefore I am for this Bill.

Mr. Pelham. I did not think to have troubled you this Day, I did rather intend to have left it to others that can ſpeak better, or have not ſpoken upon this Subject; but that which hath been mentioned by ſeveral,

ſeveral, is, as if they did think that we who mentioned the Law of God upon this occaſion, did it as if we did think the Law of God was binding to you at this Day; I never thought any ſuch thing otherwiſe than as to the Morality of it, ſo far forth as it is grounded upon Reaſon and Juſtice, and tends to the clearing of an Innocent Man, and ſo far we and all Mankind are bound by it; and that Law having been afterwards confirmed in the *New Teſtament* by our Saviour and the Apoſtles, at leaſt approved of by them; and this having been confirmed by the Law of *England* likewiſe, I do not think this a fit occaſion for you to paſs by ſo Fundamental a Law as that is: And I conclude with this, That I can't ſatisfie my ſelf in my Conſcience, and ſhould think ſome misfortune might follow me and my Poſterity, if I paſſed Sentence upon Sir *John Fenwick*'s Life, upon leſs Evidence than the Law of *England* requires.

Sir H. Crofts. I ſhall endeavour as much as I can, to give you little trouble in this Matter; but becauſe it hath been hinted and remarked ſo particularly upon me, I muſt beg leave to diſcharge my Duty as well as my Conſcience, as to what I ſaid here the other Day.

Sir, I do very much forget my ſelf, if I did aſſert that there was no ſuch place in Scripture that required two Witneſſes; the thing that I ſaid, was this, That if any Gentleman could ſhew me any Rule from Scripture that required two Witneſſes more in the Caſe of Treaſon than in the Caſe of Murther or Felony, I ſhould be glad to ſee it. I do ſay, that the Scripture ſhall be a Rule to me, as far as the Scripture requires; but I do take the Jewiſh Law not to be ſo abſolutely literally binding upon us here. And as to the Text out of *Numbers*, that very Text of Scripture is particularly and literally applicable to Murther; and if that be binding now, we have been very much miſguided by our Predeceſſors, and think we are bound to take it in hand, to Repeal all Laws that are againſt it.

Sir,

Sir, he is pleaſed to deny us, in ſome meaſure, the liberty of being guided by our Conſciences; truly, I don't know what he would have Gentlemen go by; let him go by what Rule he pleaſes, I will go by the Rule of my Conſcience, and will not do any thing againſt it upon any Conſideration or Conſequence whatſoever; nor will part from the Liberty and Power of Parliaments, for any Rule or Law of Inferiour Courts whatſoever.

Sir, you are told, you ought to be guided by the Rules of Law, that is not the Forms of Law, but the Rules of Law. Sir, I ſay, if theſe Rules were made to bind Parliaments, it was reaſonable they ſhould be bound by them; but if they were made only to bind Inferiour Courts, they are far enough from being intended to put a Cramp upon the Proceedings of Parliament; and if you ſhall once ſubject your ſelves to them, you give the Lawyers ſuch a Power, that I don't doubt, but their Books will be of greater Authority than your Journals; therefore, in Conſideration of that, and becauſe I would leave that which is the Right of Parliaments to my Succeſſors, I ſhall not ſubmit to that.

Therefore, I ſay, I come clearly to the Point, whether Sir *John Fenwick* be Guilty or not. Only I muſt obſerve a little back, That as to thoſe Inſtances that the Worthy Member was pleaſed to make uſe of, of *Raviliack*, and of *Felton*, ſhall thoſe Extraordinary Caſes, that which Men did in heat of Blood, and private Malice, ſhall theſe be brought to bear a Parallel with what is done in Parliament for the Juſtice of the Nation? I don't doubt but there are Men enough, in their Conſciences, at leaſt with pretence of it, will juſtifie the Deſtruction of your Government and Religion, and every thing elſe, All thoſe Men that deny the Right of your Government, have Conſcience and Juſtice enough to ſubvert it if they could; and therefore I do not ſo much wonder, that many Men without Doors have argued in that Nature.

But

But I ſay, my Conſcience is the Rule I muſt go by; and to me the Queſtion is, only whether Sir *John Fenwick* be Guilty, or not Guilty, and I am called to give my Judgment in it, and I think I am bound by the Law of Nature, by the Law of the Nation, and I ſee nothing in the Law of God that prohibits me to give my Judgment according to the Evidence, and the Opinion I have in my Conſcience of the Truth of it.

If there be no ſuch Rule that requires two Witneſſes binding upon me, if I may go upon one Witneſs, if I believe he ſpeaks true, and that the Perſon is Guilty, then I am bound to act for the Preſervation of the Nation, and all our Poſterity: They that made this Attempt, made it upon you and your Poſterity for ever; 'tis not ſo ſmall a Matter as ſome repreſent it; 'tis not the Perſon ſo much as the Nature of the Fact we are to conſider; and we are not to let Men eſcape Puniſhment according to their greatneſs or their ſmallneſs, but according to the Nature of the Fact, and their Guilt. I think I have that freedom, and I am ſo little bound by thoſe Rules that have been urged, that if both Witneſſes were here, and gave Teſtimony againſt him, if I did not believe him to be Guilty, I would loſe my Life rather than Vote him ſo; but on the contrary, if here be ſufficient Evidence to convince me, though not according to the Rules of Inferiour Courts, I will not ſubject the Freedom of Parliaments to thoſe Rules.

Sir, you have been told formerly, and I think it a Matter of that weight, I beg leave to urge it again, becauſe 'tis a great Reaſon that guides me in this Matter, if you lay it down for a Doctrine in this Houſe (for a Reſolution here taken, is as much a Rule as a Law, for it ſhall be brought as a Precedent, and therefore if it ſhall be laid down as a Rule here,) That you will never Attaint any Man, or find him Guilty, but upon two Witneſſes, I think the Government, and all you have, ſtands upon a tottering Foundation:

He muſt be a very ordinary Stateſman that can't lay his Plot ſo, as you ſhan't reach him by two Witneſſes.

Therefore I ſay, I think it becomes the Wiſdom of Parliament, not to declare themſelves bound in that reſpect; I would have them bound by Juſtice, but not by the common Rules of the Law.

Sir Rob. Cotton. Sir, I do find that Gentlemen do very much inſiſt in this Caſe, That if a Gentleman does believe that Sir *John Fenwick* is Guilty, he muſt give his Vote for the paſſing of this Bill; if that be ſo, I am glad that Opinion did not take place in the laſt Reign, if it had, I am of Opinion I ſhould not have been here now; and I believe my Lord *Warrington*, who was very Inſtrumental in promoting this Revolution, would not have died in his Bed. My Lord and I were accuſed of a Crime, which I believe, if proved by two Witneſſes, had been Treaſon: I have heard ſome Gentlemen ſay in this Houſe, they did believe my Lord *Warrington* was Guilty (though he was not Guilty of the Fact as it was laid.) There was a Man ſwore, *&c.* and there was ſome corroborating Evidence; but as to Mr. *Offley* and my ſelf, there was none but this particular Perſon, and they Indicted us of Miſdemeanor, though it would have been Treaſon, if there had been two Witneſſes: Now if the ſame Fact was Treaſon when proved by two Witneſſes, and but Miſdemeanor when proved by one, methinks we are doing an Extraordinary Thing: We are going after the Fact committed, to make that which is but a Miſdemeanor, to be Treaſon. And for theſe and other Reaſons, I can't agree to the paſſing of this Bill.

Ld. Norreys. Sir, though I had always an Apprehenſion of the ill Conſequences of this Bill, yet never ſo much as now; for this Gentleman hath given Arguments that ſhake me more than all that I have heard before; for he ſays, there are a great many Men, if they may proceed according to their Conſciences, will

will Subvert this Government, and bring in King *James* and Arbitrary Power; and he tells you, That every Precedent in this Houſe, is equal to a Law, and will juſtifie the like for the future. I am ſure I am very unwilling to make a Precedent that ſhall juſtifie Men in ſuch ill Actions, in ſaying, their Conſciences prompted them to it.

Then a Queſtion was put for bringing in of Candles, which paſſed in the Affirmative, and they were brought in.

Mr. Hamond. Mr. Speaker, I don't think the Power of Parliaments in queſtion in this Caſe; but then, as all other Powers, it muſt be founded upon Juſtice, and never uſed but upon Extraordinary Occaſions, and when Criminals are not to be met with otherwiſe. The Power of Parliament is not leſſened if this Bill does not paſs: But the Queſtion is, Whether this Power ſhould be Exerted in this Caſe? What Gentlemen ſay of being guided by Conſcience, hath no weight with me, further than that is governed by the Law of the Land. If it be to be admitted in the Caſe of Life and Blood, why not in *Meum & Tuum*? Why was he brought to the Bar then, if according to our private Judgment we are to determine this Matter? No Man thought but he was Guilty.

I beg leave to mention one thing that is come to my Knowledge. After the Tryal and Condemnation of Mr. *Cook*, I had an Order ſent me, that I might ſee him, and I went to him by Vertue of that Order, and the greateſt part of the time I ſpent with him, he took up in declaring againſt the Evidence of *Goodman*, and that he would Receive the Sacrament upon it, and give it in Writing, as his dying Words. I ſaw alſo three Witneſſes confront him at his Tryal, and when I heard him ſay this, it weighed ſo much with me, that I have very great ground of Suſpicion, That *Goodman* was Perjured in the Caſe of *Cook*.

Here hath been Popular Expreſſions of Plots, and *Jacobites*, that no Man can apply to this Particular

Caſe, or ſay, this is a Caſe wherein we ought to uſe this Extraordinary Power. He was in the Hands of the Law, and no body can ſay, that the Government muſt ſink, if he does not die. If we go from the Rules of Juſtice, I believe it will give a great blow to the Government.

Mr. Vernon. Sir, I riſe up only upon what that Worthy Gentleman hath offered unto you; for I did not think to trouble you with any thing of that Nature. But if you will give me leave to acquaint you with what I believe, who have been later with him than this Gentleman, and much oftner. Sir, he does tell you, that he is very far from denying what hath been ſworn againſt Sir *John Fenwick* and himſelf, concerning the Conſultation to bring over the *French*, for he hath a very particular remembrance of it, and if that Gentleman was to ſpeak with him now, he would ſatisfie him, I believe in that Point: And ſince I am up, I think every Man that ſpeaks upon this Occaſion, ſhould likewiſe give ſome Account of himſelf, in what Manner, and for what Reaſon he diſcharges his Conſcience here; I hope I may uſe that Word, ſince Gentlemen make uſe of Conſcience for his Acquittal, and a Man ought to have a very good Conſcience for his Condemnation.

As to Sir *John Fenwick*'s Innocence, I wiſh he had given no Occaſion to have it called in Queſtion; and ſince he did fall under this Accuſation, I wiſh he or his Counſel for him, would have taken ſome pains to have made his Innocency appear; but I don't find the Queſtion is, Whether Sir *John Fenwick* is Guilty, but whether there be any Evidence of his Guilt? And I ſhall tell you, in ſhort, my Opinion of that. I take the Proof of the Fact to be in general, ſuch a Demonſtration as the Nature of the Thing is capable of, and that is ſufficient to convince a Reaſonable, Honeſt, Unprejudiced Man, of the Truth of what is Aſſerted, when there is no manner of doubt left, whether it is ſo or no, nor the appearance of any poſſibility,

poſſibility, that it could be otherwiſe. I think there hath been that Proof in this Caſe, and nothing attempted to diſprove it, and nothing hath been proved on Sir *John Fenwick*'s Behalf, that any wrong hath been done him. And therefore, in ſhort, my Senſe of it is, That whereas ſome Gentlemen think him Guilty, but the Matter not proved; I think him Guilty, becauſe 'tis proved, and there hath been no offer made to diſprove it.

Mr. Bromley, Warr. Some Gentlemen have ſpoke of the Power of Parliaments, but I ſhall ſay nothing to their Power, which I have learned from my Lord *Coke*, is ſo Tranſcendent and Abſolute, that it can't be confined within any Bounds: But the more Juſt and Honourable it ought to be in its Proceedings, to give an Example to inferiour Courts; and though their Power can't be deny'd, yet the Exerciſe of it hath been often Cenſured and Condemned; and Acts that have paſſed in one Parliament, have been in the ſame Reign Repealed, and ſometimes ſeverely Branded; *Id poſſumus, quod jure poſſumus.* 'Tis certain here is a defect of Legal Evidence: We are not tyed here to the Forms of *Weſtminſter-Hall*, but certainly, with Submiſſion, we ought to tye our ſelves up to the Rules of *Weſtminſter-Hall*, eſpecially when they are founded upon Common Juſtice, which is the ſame, is not *Mutable*, and ought to be *Univerſal*.

By the Law of the Land, no Perſon is to be Convicted in Caſes of Treaſon, but upon two Witneſſes; the Law of God is the ſame. However, if you will paſs this Bill, all Perſons muſt acquieſce, and there is no diſputing of your Power afterwards. It hath been an Argument uſed to Day, That the Security of the Government requires the paſſing of this Bill, which I think to be a good one too, if they can make it appear, that unleſs you proceed in this way, the Government is in Danger; though I muſt obſerve, it was not that Conſideration, but the Vindication of an Ho-

nourable Perſon's Reputation, that brought this Matter firſt before you.

It does not appear to me, That Sir *John Fenwick*'s Life or Death can endanger the Government. You have been told, of a Deſign that he hath been Engaged in, as is carried on at this time, That an Invaſion from *France* ſeems to threaten us: The former Deſign hath been happily Diſcovered and Defeated, and 'tis not probable that Sir *John Fenwick* ſhould have any great ſhare in any that is carrying on at preſent: And as far as I can learn, he is not ſo conſiderable a Man in his own Perſon or Intereſt, that we need fear him.

An Honourable Perſon ſaid, if we do not paſs this Bill, they that ſent us here, would give us no Thanks: 'Tis not a good way of Arguing; but I believe, if thoſe look forward, they will thank us. Sir, in the Act for Declaring the Rights and Liberties of the People, you have ſaid, *That the late King* James, *by the aſſiſtance of divers Evil Counſellors*, &c. How comes it to paſs, that we have never Attainted any of them? And if we are for proceeding in this way of Attainder, becauſe it pleaſes them that ſent us hither, I dare ſay, the Attainting one of thoſe Men, would gratifie thoſe that ſent us hither, more than the Attainting Twenty ſuch as Sir *John Fenwick*. It was pretty well known what ſhare ſome Gentlemen had in bringing in of Popery and Arbitrary Power; and I will take the Liberty to ſay, That there is never a Gentleman in this Houſe, but believes them to be the worſt of Criminals.

Upon the whole Matter, I do not think you have any occaſion to Exert a Power, that no body denies; I ſee no Security this will be to the Government, and conſequently, no neceſſity of it: I think you are making a moſt dangerous Precedent, and that it will be of ill Conſequence to you, and therefore I am againſt this Bill.

Mr. Smith.

Mr. Smith. Sir, I will be as ſhort as I can, and if it had not been for ſomething in this Day's Debate, I ſhould not have troubled you. As to what was ſaid by the Gentleman that ſpake laſt, of making Examples of ſome that had been Criminal in the laſt Reign, how that came to happen, that no ſuch Examples were made, I ſhall not now Entertain you, but I believe moſt of the Gentlemen in the Houſe know pretty well.

But I take the Matter before you, is what Evidence you have to prove Sir *John Fenwick* to be Guilty, and whether there be not an Extraordinary Occaſion at this time, to Exert the Legiſlative Power?

I ſhall not enter into the Matter of Precedents, thoſe are out of my Province, but I have read ſome; however, it ſhall not paſs upon me for a Rule, becauſe ſome Bills have been Reverſed, no others ſhall be brought in; it is poſſible that the Reverſing of them, may be worſe than the firſt bringing of them in.

But to apply my ſelf to the Evidence, I can't but obſerve one thing that ſeems this Day Extraordinary: We are told by ſome Gentlemen, they are againſt our Proceeding upon this Bill, becauſe it does not *quadrare* to the Rules of *Weſtminſter-Hall*, and at the ſame time, Gentlemen take Liberty to make Exceptions here againſt that Evidence that *Weſtminſter-Hall* has allowed: And it ſeems hard when they Argue from *Weſtminſter-Hall*, that they ſhould take Exceptions to that Evidence which the Law of *England* allo vs to be good. For it is notorious, it hath been admitted in *Weſtminſter-Hall*; And Gentlemen might have as well have told you, That thoſe Men that Suffered, died Innocent, as to have denied it; and I think there is a further ſtrengthening of his Evidence, for there is not one Man, who hath died upon his Evidence, but hath acknowledged himſelf Guilty of what he hath Charged him with.

As to the Matter of the other Evidence, Sir, I do not ſay that it is Evidence that will come into *Weſt-*

minſter-Hall; but at the ſame time, give me leave to tell you, They ſeem to lay a little ſtreſs upon it, when they tell you, they believe it was falſe Evidence; and inſtance in what *Cook* ſaid to a Gentleman of this Houſe, after his Condemnation; but I think thus far I may ſay, That when you ſent ſome of your Members to Examine Sir *John Friend*, he did own all thoſe Perſons to be at that Place, and that is a much better Argument for the Validity of *Goodman*'s Teſtimony. But as to the Matter before you, ſome Gentlemen have made it a Queſtion, Whether Sir *John Fenwick* be ſo conſiderable a Man, as you ſhould Proceed in this Extraordinary Manner with? Though they all ſay, you may do it, yet at the ſame time they tell you, this was never put in Execution, but they were in the wrong that did it.

Now, Sir, the Queſtion is, Whether you ſhould make uſe of this Power at this time? Say ſome, The Plot is over, I wiſh it was: But when a Conſpiracy hath been laid ſo deep and general as this was, 'tis not the Hanging of one or two that will make us ſafe. When 'tis apparent to you, here is all the Artifice in the World, all the Endeavours in the World, by Sir *John Fenwick*'s Friends, to remove *Goodman* out of the way, 'tis ſome Argument that he had ſomething to ſay to him: And when we ſee Priſons broke open daily, and we have known Perſons Murthered in the Streets for giving Evidence, (very notorious is the Caſe of *Dodſworth*) you have Plots all about you, and yet can you think there is no occaſion to make uſe of this Extraordinary Power?

I would have as great a Conviction upon my Conſcience as I could, but 'tis very hard a Man muſt throw his Conſcience aſide in the Caſe. 'Tis very hard to believe, That if there be two Witneſſes produced, though I don't believe the Witneſſes, yet I am ſafe if I Condemn the Man; and if there be but one Witneſs, I am to Acquit the Man, though I believe him to be Guilty.

And

And though they go to Scripture, to tell you there muſt be two Witneſſes, yet they don't go ſo far as to tell you there have been very Extraordinary Things done, even by God himſelf, for the preſerving a Community.

And where is the Reaſon of it, that one Witneſs may take away a Man's Life in one Caſe, and not in another? There was a Thing ſaid, that was one thing that occaſioned my ſtanding up: A Gentleman ſaid, truly, it ſeemed to him to be a better way to put an End to the Plot, to have an Act of Indemnity, than the Conviction of Sir *John Fenwick* would be. Sir, there ſeems very little Reaſon for Acts of Indemnity, when we have ſeen an Act paſſed ſo lately, which has not reſtrain'd Perſons, nor brought them to a Senſe of their Duty; and we have heard Perſons own at your Bar, That the Fact was committed juſt after the Act of Indemnity. Sir, I do heartily, according to my Conſcience, Vote for this Bill.

Mr. Harcourt. Sir, I am ſenſible 'tis very difficult to ſay any thing, and not ſeem tedious at this time of Night; but I take it to be my Duty not to be ſilent in this Matter.

All the Arguments that I remember have been made uſe of in any former Debate, or in this Day's, may be reduced, in ſhort, to theſe two Heads; the danger of the Government, and Gentlemens private Opinion.

Sir, as to the Danger of the Government, if any body will Convince me there is ſuch danger, (I promiſe him, if it be worth his time ſo to do) I will be his Proſelite, and Vote for this Bill: But, to tell me the Government is in Danger, and the Fate of *England* and *Europe* depends upon this Bill, is certainly rather offered to Amuſe, than to Convince.

It hath been asked, Can the Circumſtances that Sir *John Fenwick* is in admit of any Danger to the Government, which hath Power over his Liberty every day, and may reſtrain him of his Liberty during

his Life? A Man, by the Account I have had of him, of little Intereſt, not worth Nine Pence. (I have no Acquaintance with him, and ſo I may eaſily miſtake his Circumſtances.) But, Sir, whatever his Circumſtances are, he is in ſafe Cuſtody, and no doubt there he will be kept; and to ſay the Government is in danger by ſuch a Man, ſure, that can't be thought by any Man living: And God forbid this ſhould be the Caſe of the Government, that it can't ſupport it ſelf without taking away this unfortunate Gentleman's Life, contrary to the Rules of Law.

For the Argument of private Opinion, 'tis almoſt as dangerous as the Precedent you are making. I will not urge it from the Caſe of the People called *Enthuſiaſts* and Madmen; but I will urge it in the Caſe of Men that ſit in Judgment, if Opinion is to juſtifie the Condemning of a Man, let us never more call the Verdicts againſt Mr. *Cornish*, Mr. *Sidney*, Lord *Ruſſel*, and others, Murthers. Ask the Jury, no doubt none of them are ſo ſilly, but will tell you, in his Opinion they were Guilty; but if Opinion may Condemn a Man without Proof, Why not Acquit him as well where there is a plain undeniable Proof? Such a Practice, I am ſure, would never be endured.

The propereſt Method, I think, was propoſed by the Gentleman that began the Debate; and I beg leave to follow the ſame ſteps, to conſider his Guilt, How it appears to us, and whether there be any Reaſon for this Extraordinary Manner of Proceeding.

The Recital of the Bill are the Arguments for it; and thoſe we ſend up to the Houſe of Lords, for the Paſſing of this Bill: And firſt, it ſays, That Sir *John Fenwick* was Indicted by the Teſtimony of *Porter* and *Goodman*, *&c.* It ſays, that ſeveral Days were appointed for his Tryal, and at one of thoſe Days the Tryal had come on, if it had not been for the Diſcovery that he pretended to make; but it does not ſay, it was put off at any other Days or Times, for that Reaſon: But it goes on, and ſays, he hath made

ſeveral

ſeveral Reflections, *&c.* inſtead of making an Ingenuous Diſcovery; and then it recites how that *Goodman* is withdrawn.

I would beg leave to put Gentlemen in mind of what was a great Inducement to bring this Bill in: It was ſaid, That Sir *John Fenwick*, and his Relations had done it; That they would prove that *Goodman* was withdrawn by his Means. Give me leave to ſay, the Bill does not ſo much as recite that, and I beg leave to ſay, That there was no Proof of it, unleſs the Hearſay of *Clancy*, and the Actions of my Lady *Fenwick* are to be Evidence, contrary to the known Laws of *England*, to affect this unhappy Gentleman in the Caſe of his Life. I ſay, if any Gentleman had been of another Opinion, no doubt, he would have offered that Amendment to the Committee.

As to the Diſcovery that Sir *John Fenwick* hath made, it does not appear to me, whether it be true or falſe: It is one thing to give a Vote to clear a Gentleman's Reputation, and another thing to carry it ſo far to give Judgment, That the Perſon that made thoſe Reflections ſhall die, and that before any Proof of their Falſhood.

Here is an Indictment found, and here is an Evidence withdrawn, that is all I am ſatisfied in: And ſuppoſing the Perſon Guilty, it is no manner of inducement from theſe Arguments, to proceed in this Extraordinary manner.

But I would conſider the Matter of the Amendment made at the Committee (*Of which Treaſons he the ſaid Sir* John Fenwick *is Guilty.*) I can't ſay that; and therefore I can't Vote for the Bill. If he be Guilty, it does not appear ſo by Legal Evidence, and therefore if I am to Judge him, he appears to me as an Innocent Man. The Law requires two Witneſſes to Convict a Man of this Crime. 'Tis the greateſt Crime, and the Law is ſo merciful, that it won't expoſe a Man to ſuch great Penalties, without demonſtrative Evidence.

The

The firſt Act of Parliament that requires two Witneſſes, is, 1 *Edw.* 6. The next is, 5 *Edw.* 6. And upon that Act, give me leave to take Notice: That Act goes a little further than the Firſt; for the 5 *Edw.* 6. does not only ſay, *There ſhall be two Witneſſes*, but it goes on, and ſays: —— *which two Witneſſes* (they are there called Accuſers, but mean the ſame thing) *ſhall be produced in Perſon before the Party at his Arraignment, and ſhall there, before his Face, Maintain, and Avow what they have to ſay.* So the Parliament particularly provided, That there ſhould not only be two Witneſſes, but that they ſhould appear in proper Perſon, in open Court.

I beg leave to obſerve, That after the making of the firſt Act, in the ſecond or third Year of *Edw.* 6. there was an Attainder of Sir *Tho. Seymour*, in Parliament, without Hearing of him; and that very ſelf-ſame Parliament, within two Years afterwards, ſeems ſo to have repented of that Matter, that they made that Proviſion I have mentioned, in the 5 *Edw.* 6. And to ſecure, That that ill Precedent ſhould do no harm, they put in that Clauſe. If this Act paſſes, I wiſh we do not repent it in leſs Time than that Parliament did the Attainder of Sir *Tho. Seymour*. Let us be guided by the Reaſon, the Juſtice, and the Diſcretion of that Act, though we are not bound in our Legiſlative Capacity, by the Power of it. I can't but obſerve, that from the making of that Act, no Perſon has been Attainted in any other manner, till the Duke of *Monmouth*. So great a Veneration has that Law always had in all Reigns, though multitudes of Conſpiracies have happened in them all. I do not think it ſo material that there ſhould be two Witneſſes, as that theſe Witneſſes ſhould be heard Face to Face, and Croſs-examined. It hath been told you, That 'tis Natural Juſtice and Reaſon, that there ſhould be two Witneſſes, A Gentleman asked you, where that Natural Juſtice was before the Statute of *Edw.* 6? Sir, the Statute of 25 *Edw.* 3. ſays, That every Perſon

that

that is Attainted, *ſhall be provablement Attaint*; and ſomewhat may be from thence inferr'd more than that the Crime ſhould be prov'd, for ſo muſt every Crime. But as to the Proof required by that Act, and the Acts of *Ed.* 6. All thoſe Acts, by very learned Opinions, have been thought Declarative of the Common Law; but that's ſcarce worth the Enquiry, ſince 'tis certain how the Law ſtands at this Day.

An Honourable Gentleman took notice, That ſuch Evidence as we have had, and ſuch Proceedings as theſe, would not be reaſonable in Caſe of an Impeachment, but diſtinguiſhed between that Proceeding and this; but certain, the Reaſon is the ſame: 'Tis true, the ſame Perſons that accuſe in one Caſe, give their Judgment in the other, but in each Caſe, ſuch Priviledges as are juſt and reaſonable ought to be allowed to the Party accuſed.

I ſhall add no more, but that we are making a Precedent which can't be made without breaking through all the Fences of the Law, and when 'tis made, we know not who may ſuffer by it.

Sir Rich. Temple. As to the Evidence you have before you, I appeal to any Man, whether at the Common Law, if there was but one Witneſs againſt a Man, Whether he was not at liberty of demanding Tryal by Battle? Thoſe Acts that have been made ſince, are made certainly to provide, That in no Caſe whatſoever, a Man ſhould be ſo much as accuſed without two Witneſſes of the Treaſon.

As to what hath been ſaid of the particular Evidence before you, what hath been obſerved here, is a good Objection in the Courts below: I do not ſay it does diſable a Man from being an Evidence, becauſe he is not Pardoned, but he is not ſo good an Evidence as if he was pardoned. But that I ſtand upon is this; Shall you come here and make a Precedent in this Place to condemn a Man to the higheſt Penalties, upon leſs Evidence than you will allow any body elſe to do it? That is what was never done in Parliament before.

fore. Will you make a Precedent in Parliament, that at any time they may bring in a Bill here, and judge a Man to Death for Treaſon upon one Evidence ?

As to this Bill it ſelf, conſider what a Precedent you will make. There is nothing that any Bill was condemned for in Parliament, that is not in this Bill. All Mankind muſt perceive, That you have but one Evidence, and ſuch a one as I have told you. And what ever any Man's private Perſuaſion is, 'tis the Proof muſt govern you. Then this is a Law, *ex poſt facto*, and that hath been always condemned, you make that Evidence that was not ſo before. Sir, this is beſides making a Law in a particular Caſe, againſt the Common Law of *England*, and the Right that every Subject has. It is making a Law to hang a Man without a Tryal; 'tis making a Law here, that was introduced upon a Pretence to make him an Evidence: Every one ſaid, That they did not ſeek his Blood, and if that be the ſecret inducement in this Caſe, 'tis a dangerous Precedent. The Earl of *Exeter*, when he brought the Rack into the *Tower*, every body knows the Fate that came upon him afterwards.

Let any one Body ſhew me there was any Reaſon for reverſing any Act of Parliament, they are all againſt this Bill.

Then to the neceſſity of it, I can't imagine any thing that hath been ſaid to you upon that, is a ground for this Bill. Pray conſider firſt, how this Matter came before you, it was for an Honourable Perſon's Vindication, and it was not tranſmitted to you by the King, but by the Honourable Secretary: He told you, That if you had a mind to ſee theſe Papers, and required it, he had leave to let you have them; but if it had been a thing of this Conſequence, That the Government had been in the utmoſt Danger, Would it have been tranſmitted only at the Requeſt of a Private Gentleman, and left unto you, whether you would proceed upon it or no?

But

But 'tis obſerved, That the Plot may go on ſtill, Pray if this Gentleman be cut off, does that cure it? You are ſecure of him now, that he can't act in it; ſo that I have not heard the leaſt ground to convince me, That the Government would be in leſs Danger, if this Gentleman was cut off.

Sir, we are told here of going according to our Conſciences; give me leave to ſay to you what was inſtanced in the other Day, That in the worſt of Times, when they did not ſtick at murthering of the King, yet they ſtuck at this. They would not allow any Man to ſuffer upon one Witneſs: And they did not admit of Depoſitions againſt my Lord *Mordent*, and my Lord *Mordent* ſaved his Life by it.

You have depoſed King *James* for breaking in upon the Law. Did any body believe that Mr. *Hampden* was not Guilty of the Treaſon he was charged with? He owned it before this Houſe, and yet he was tryed only for Miſdemeanour, there being but one Witneſs againſt him, and they that ſtrained all other Laws, ſtuck at this, and would not violate this Law. So that I think there is no neceſſity for making ſuch a Precedent, and I think it would be the worſt of Precedents.

Mr. Boſcawen. I have obſerved upon this Debate, That ſome Perſons deny that 'tis juſtifiable at any time, to Proceed upon Bills of Attainder, and yet they don't diſpute the Power of Parliaments, but at the ſame time ſay, they ought to go according to the Rules of *Weſtminſter-Hall.*

Another ſays, 'tis the ſame thing whether we Proceed by way of Impeachment, or Bill of Attainder, I think him much out of the way, for in that Caſe, the Lords only are Judges, and you are the Proſecutors, and you don't uſe your Legiſlative Power in that.

A Worthy Friend of mine ſaid, He had often been miſtaken in his own Conſcience, when he thought himſelf very much in the Right. That might be ſo,

and

and if there was any room rationally to ſuppoſe, That Sir *John Fenwick* was not Guilty, I ſhould be of Opinion to be of the more favourable ſide, but I take it, there is no room for any Man to believe but he is Guilty.

Now I would examin what grounds we have to believe him Guilty. Upon Tryals, when they charge a Jury with a Priſoner, one part of their Charge is to enquire, whether he fled for it or no? 'Tis notorious, that Sir *John Fenwick* fled for this, which is no ſmall Argument of his Guilt. Another is, That he was here at the Bar, and did not deny the Fact. If he had confeſſed it, no doubt but you would have concluded him Guilty, and when he does not deny it, this is next Door to it.

It hath been told you, many Bills of Attainder have been reverſed as Unjuſt; it hath been as notorious, That the Verdicts of Twelve Men, and when Men have been tryed by their Peers, have been reverſed too; I will Inſtance in two or three. The firſt I begin with, was that of the Duke of *Somerſet*, but no Body could ſay, but he was Guilty of the Fact, for he confeſſed it; but there was a powerful Enemy, the Duke of *Northumberland*. The next is, the Duke of *Norfolk*, who was Attainted in Queen *Elizabeth*'s Time; and they were not by Parliament, and yet both were reverſed. And I think, as this Matter ſtands now, ſome Gentlemen are of Opinion, by the Evidence they have heard, That he is Guilty; but I think no body hath ſaid, That it appears to him by the Evidence he hath heard, That he is Innocent. Now I deſire to know, whether every Man muſt not uſe his Conſcience to judge, whether there be ſufficient Evidence? I acknowledge there is not ſufficient Evidence to Convict him in *Weſtminſter-Hall*, but there is more to ſatisfie my Conſcience, and the World abroad, than if *Goodman* was here; beſides his not denying it, you have the Evidence of the Perſons that died, who owned the ſame Thing:

And

And I mention that, the rather, becauſe they confeſſed it to Perſons ſent from this Houſe, and did not only confeſs themſelves to be Guilty, but acknowledged, That there was ſuch a Conſpiracy: And Sir *William Perkins* acknowledged in particular, That he was to raiſe a Troop of Horſe, and that the French were to be invited over. Is this nothing? Is not this to be taken notice of by the Legiſlative Power, that is to ſecure the Peace and Welfare of the Government?

Gentlemen ſay, there is a great deal of Danger in this Matter; Some, if you acquit him; others, if you condemn him. If you are ſatisfied he is Guilty, by this Bill, you ſet up a Land-Mark, that others may take care they do not come into this Predicament. On the other Hand, if you reject this Bill, you will give Advantage to your Enemies, when they ſhall ſee a Man that is ſo notoriouſly concerned in calling in a French Army, the worſt of your Enemies to be Scot-free. If he be Guilty, what Danger is there of the Precedent? When a Perſon is concerned in the like Nature, and hath fled for it, and does not deny it: When living Perſons confeſs it, and dying Perſons confirm it, then there will be danger to ſuch a Perſon.

Upon the whole Matter, I think there is no Man that ever I heard, That does not believe him to be guilty; and 'tis ſtrange you ſhould want Evidence, and yet every one think him guilty; and I think no Man muſt be acquitted or condemned, but according to a Man's Conſcience.

An Honourable Perſon ſaid, *Porter* was no good Witneſs: If *Goodman* was here, he would not be ſo much, and yet 'tis argu'd we muſt acquit him, becauſe *Goodman* is not here: And therefore, upon the whole, I think you will give your Enemies a great Advantage, if you acquit him; and if you condemn him, you will do your ſelves Right.

Mr. Cowper.

Mr. Cowper. Sir, being concerned in Profecutions of this Nature without Doors, I have hitherto declined concerning my ſelf in any Debate upon this Evidence, as I have been wholly unconcerned in the Conduct of the Evidence againſt Sir *John Fenwick*; but being now to give my Opinion and Vote as a Judge, I ſhall crave leave to offer my Senſe of this Matter.

In the firſt place, I would make uſe of a Diſtinction, which I think will ſerve to anſwer ſeveral of the Arguments, that have been uſed againſt the Bill in this Debate. I think there are two things to be conſidered, Firſt, his Crime, and the Proof of that Crime, and then the other Matters done by him ſubſequent to his Accuſation.

The Crime and Proof of it that hath been given againſt him at your Bar, are the Grounds by which I think my ſelf juſtified before God and Man, in giving my Affirmative to this Bill, by which you adjudge him to die. What he hath done ſubſequent to his Crimes convinces me in my Judgment, That we are here in a very proper Method and Courſe of Proceeding againſt him: Therefore let no Man ſay on the one hand, that he is Condemned to die, becauſe he hath by Artifice protracted the time appointed for his Tryal, till part of the Evidence is withdrawn. No, he is Condemned to die for having been Guilty of High Treaſon, manifeſtly proved againſt him at this Bar. Let them ſay on the other hand, Will you in this Method Condemn every Man that is at any time Guilty of High Treaſon? No; But take it together, when a Man plainly Guilty of the worſt of Treaſons, which would have been manifeſtly proved againſt him in the Ordinary Courſe of Proceedings, but for his own Contrivance and Artifice, When a Man, I ſay, by undertaking to atone for his Crime, and to make his Country Satisfaction, ſhall by that means protract the Time for his Tryal, till one of the Evidences is gone, When a Man, to delay his Tryal,

Tryal, ſhall pretend to have a Reſerve, which he would make known to the King's Perſon only, and then when he thinks he is got out of the Ordinary reach of the Law, ſet the Juſtice of his Country at defiance. Theſe are grounds, not why he is Condemned to die, for that is purely for his Treaſon, but to juſtifie our ſelves in relation to our Proceeding againſt him in this manner.

Sir, in the next place, I would beg leave in a few words to take notice of ſome other things that have been ſaid in this Debate: Gentlemen are afraid, that this Example will be made uſe of by Poſterity, to the diſadvantage of Honeſt Men; and you have been told, that Precedents have begun with the Puniſhment of the Guilty, and then have been carryed on to the Puniſhment of thoſe that have been not ſo. 'Tis true, there hath been lately a very bad uſe made of Proceedings in the Ordinary Courts of Juſtice in relation to Publick Crimes, But what do Gentlemen inferr from thence? Muſt we therefore have no ſuch thing as Juſtice? Muſt not the Guilty be puniſhed, becauſe the ſame Methods have been, and may be made uſe of hereafter for the Puniſhing of Honeſt Men?

For my part, I am not afraid of what uſe Poſterity will make of this Example, if there come ſuch Times of Violence; alas, they will not want this Precedent, there are others which have been cited in this Debate, that will much more juſtifie their Arbitrary Proceedings. Nay, this Example may rather ſerve to Protect the Innocent; for if a Bill of this Nature come hereafter to be proceeded upon in Parliament againſt another, he may alledge for himſelf, That Sir *John Fenwick* was heard Perſonally, and by his Counſel, That the Evidence was in that Caſe produced before him, and confronted with him, There was that Extraordinary in his Crime, which is not in mine; he would not only have introduced a Foreign Army, and in that committed Treaſon;

but afterwards aggravated his Crime of High Treaſon, by endeavouring, when he was in Cuſtody, to abuſe the King, and to create a Jealouſie between the King and his Miniſters.

Sir, in the next place it is ſaid, That here is not a Legal Evidence, though there is an Evidence that really convinces Gentlemen in their Conſciences (I am not aſhamed you ſee to make uſe of that word) yet they are not for paſſing of this Bill, becauſe, ſay they, there is not a Legal Evidence. With Submiſſion, Sir, I think that is a miſtake: Before the 1 *Ed.* 6. one Witneſs was good Evidence in High Treaſon; there was indeed a variety of Opinions touching Treaſons before that Time, which that Statute was made to Remedy; but neither the firſt nor the fifth of *Ed.* 6. in the Penning or Wording of them, nor in the Reaſon of them, were intended to extend to the High Court of Parliament, nor can they extend to it in its Legiſlative Capacity. So that for ought that hath been ſaid, though it ſhould be admitted that one Witneſs, corroborated by Circumſtances, and (as this Caſe is) the Confeſſion of the Party, would not be Legal Evidence below; yet, with Submiſſion, it is a Legal Evidence in Parliament, even according to the ſtrict Rules of Law, becauſe no Law hath made Witneſſes requiſite in this Place; nor could a former Parliament Enact what ſhould be a Legal ground, and what not, for the paſſing a Bill in this. So that as it is a Convincing Evidence, I think it may, for that Reaſon, be juſtified to be a Legal Evidence here in Parliament: And as it Convinces me, ſo that I can't reſiſt the belief of it, I muſt be, upon that ground, for this Bill, notwithſtanding what ſome Gentlemen have ſaid by way of endeavouring to explode Conſcience as a Rule not to walk by in this Caſe. One Inſtance given againſt it was (it ſeems) becauſe a Hangman has not a Diſcretionary Power to Execute a Man according to his Conſcience, and put him to what ſort of Death he pleaſes; as if we had not a better

better, and more Legal Diſcretionary Power here in the High Court of Parliament, than the Common Hangman in the Execution of his Office.

But we are told of ſeveral Inſtances where Mad and Hair-brain'd Men have made uſe of Conſcience to palliate their Extravagancies: No doubt it hath been ſo; and let me tell you, Religion too hath been as often made uſe of for a Pretence to the worſt of Villany in all Ages, and yet I hope they will not Argue from thence, that there ought to be no ſuch thing as Religion neither, for a Guide to mens Actions.

When Men are to be Judges, I would fain know what Rule they have better to walk by, than a ſedate, and well-informed Conſcience in the Courts below, when a Legal Evidence is given? Yet the Jury are not bound to go by that Legal Evidence; they are, when they have heard it, Judges of the Credibility of the Fact, and are at laſt to go by no other Rule than what has been ſo much ridiculed in this Debate, even the *Rule* of their own *Conſciences*.

It was ſaid pretty early in this Debate by a Member of great Reputation, That this (except *Monmouth*'s Caſe) is the firſt Precedent of a Bill of Attainder that began in this Houſe. It ſeems the Ancient way was, for the Lords to give the Witneſſes their Oaths, and when they thought fit, they thereupon ſent down a Bill, and the Commons were to proceed upon it: But I think, with Submiſſion, this is a much better way; and I had rather give my Conſent upon hearing Convincing Evidence, and ſeeing that the Party has nothing to ſay for himſelf, than upon any Bill tranſmitted hither from the Lords, and no other Evidence before us, than that they thought fit to paſs it.

Some Gentlemen have ſet a great weight upon this Argument: Say they, Sir *John Fenwick* is not a Man ſo conſiderable as to endanger the Government. I admit it, they that have ſpoke for the Bill, have not (as

I obſerve) made uſe of the contrary Arguments; but as to that, this is what I lay my Finger upon in particular. 'Tis plain he was to be General, and muſt know a great many of the Officers under him; and therefore I am ſatisfied he hath not made that Atonement to his injur'd Country that is in his Power, and that he ought to have done. And I am ſatisfied that unleſs this Bill proceed againſt him with the greateſt ſteadineſs, you will have none of that Diſcovery * —— Don't let Gentlemen pervert this Argument, and ſay, Will you Hang a Man if he don't Confeſs? No; but when I have heard ſuch Proof, that he is Guilty of the worſt of Treaſons, and that he hath aggravated his Crime in the manner he has done, I think he deſerves to die, unleſs he will merit his Life by a uſeful Diſcovery of what he cannot but know. And I think it of the higheſt Importance to you that can be, that you ſhould come to the further Knowledge of the other Branch of the Conſpiracy, the meeting and joyning with the *French* King's Forces in *England*. I think you are now in a proper Method to attain that Knowledge, and perhaps you may have a better Iſſue of this Bill than this Gentleman's Death; but if not, he will but pay that Debt which he manifeſtly owes to the Juſtice of his Country.

* *Here he was interrupted by the Noiſe of ſome Gentlemen, ſhewing diſſatisfaction at that way of Arguing.*

Mr. Paget. Sir, I can't believe but I ſhall be heard, as to the little I have to ſay, with ſome uneaſineſs, after ſo long a Debate. But, Sir, ſince I did take the Liberty to give my Opinion, why I was againſt this Bill before; I think it as reaſonable to give you my Reaſons, why I don't ſtand convinced by the Arguments I have yet heard. And that I may the better give you my Reaſons, I ſhall, as well as I can remember, repeat ſome of the Arguments that have been urged for the Paſſing of it.

If I miſtake not, ſome of the Arguments have run upon the Power and Prerogative of Parliaments; ſome

ſome upon what was proper Evidence in this High Court of Parliament, other than what would be in other Places; others upon the Extraordinarineſs of the Occaſion.

As to the firſt of theſe Arguments, ſince Gentlemen much more experienced in Rules of Parliament, do not think fit to deliver their private Opinion, what Rules Parliaments may in Reaſon be ſuppoſed to have, I ſhall not ſay any thing to that.

As to the Arguments of what Evidence ſhall be ſufficient to Adjudge a Man to Death in this Houſe, I confeſs, I ſhall at all times be very careful, how I give my Opinion in Matters of Life and Death, becauſe I think the greateſt Caution is to be uſed in that Caſe. And for this Reaſon, I can't Conſent to give my Opinion in one Caſe, that I ſhall think fit to retract in any Caſe afterwards.

If I underſtand the Meaning of the Houſe, 'tis not in Favour to Sir *John Fenwick* himſelf, that Gentlemen oppoſe this Bill, but for fear of Uſhering in a Precedent, that may be made uſe of againſt a better Man.

I confeſs, here is a Worthy Member that ſpake laſt, ſaid ſomething in his Argument that hath ſome weight with me. I did apprehend by the general Debate of the Houſe, That the Parliament had no Rules at all, but what they would fix to themſelves, but I have a great Regard for his Opinion. If he ſays true, the Evidence before you is not Legal Evidence in *Weſtminſter-Hall*, but 'tis Legal Evidence according to the Rules of your Proceeding in the High Court of Parliament. But I think truly, if they may be preſumed to have any Rules to go by, nothing is ſo plain to me, as that a Rule of their own of ſo late Date, as the Act for Regulating Tryals in Caſes of Treaſon, ſhould be a Rule to them: And 'tis ſaid in that Act, *That after ſuch a Day, no Perſon ſhall be brought to Tryal in any Caſe of Treaſon*, &c. *but he ſhall be Condemned upon the Evidence of two Witneſſes*; and I muſt needs ſay, that Act that was paſſed laſt Seſſions, is ſo much for

the Liberty of the People of *England*, that I think it will be very hard to Repeal that Subſtantial part of the Law ſo ſoon after it was made.

As to the Extraordinarineſs of the Caſe, I am ſenſible what ſtreſs hath been laid on that Argument, as if the ſtrength of this Government did in ſome meaſure depend upon your Diſpoſal of this Matter one way or the other; and ſince that is the Caſe, I ſhall ſpeak tenderly of it; for I do as much abhor Acts of Treaſon againſt the Government, as any Man that hath ſpoke for this Bill. I think, as the Crime is to be diſtinguiſhed from all others, as being a more than Ordinary Crime, ſo I think the Perſon that is concerned, muſt be Extraordinary: And I think, with Submiſſion, there is ſome difference between Principals and Seconds in an Act of Treaſon. When you can't come at a Man, being the Head of a Rebellion, it may be reaſonable to proceed by Bill of Attainder; but I think 'tis not to be uſed upon all Occaſions or when you may come at a Perſon another way; which I think, is the Caſe of this Gentleman. I am of Opinion, that there does not depend more upon Sir *John Fenwick* now, than when he was firſt Taken Why he was not Tryed, I ſhall not Examine the Reaſon; I ſuppoſe it was becauſe he gave ſome Aſſurance of his Confeſſion. Truly, I have heard no other Reaſon for Proceeding againſt him now, but thoſe Papers which have been adjudged Scandalous, and are ſo to all intents and purpoſes. But the Liberty of the People of *England* is very much concerned in the Revocation of that Act; and none of the Arguments that have been uſed can Convince me, That I ought to give Judgment upon leſs Evidence than is required by that Act.

Mr. Sloane. Sir, I hardly thought I ſhould have needed to have again troubled you with my Thoughts in this Matter, but that this Honourable Gentleman that ſpake laſt, has gone ſo far in his Reaſon, as to ſpeak to Matter of Law. He ſeems to extenuate the fault

fault of Sir *John Fenwick*, and gives it as a Reaſon why he ſhould not be Attainted by this Bill, for that he was none of the Principals, but only an Acceſſary; there is no Gentleman of the Gown, but will tell you, That there is no Acceſſary in Caſes of Treaſon, but they are all Principals, and equally Guilty; and there is no Evidence in this Caſe to make him Acceſſary, but he is either Principal or nothing.

When I have made this Obſervation, give me leave to tell you my own Thoughts: As every Man is to be ſaved by his own Faith, ſo may my Salvation depend upon my Opinion according to my Conſcience in this Matter, which is for paſſing this Bill.

The laſt time I gave you my Reaſons, why I was for this Bill, and yet I have not heard them anſwered, though a Gentleman ſaid, I anſwered my ſelf; but I will again ſtate the Caſe, and deſire him to Reply to me. I did ſay then, Sir, and do ſo again, That I do not think thoſe Scandalous Papers any Reaſon to provoke you to paſs this Bill; and I do think, if he ſhould be Threatened, it would be a Blemiſh upon his Confeſſion. Another thing I put out of the Caſe, That he is a Man ſo dangerous to the Government, that if he eſcape, we are all undone. I do take him, that in his Perſon, Intereſt, and Friends, he is not ſo; and would not have that be a Motive for the paſſing of this Bill; but take it upon the Evidence that is before us, and in the Nature of our Proceedings, Then I will ſay, we have great Reaſon to Proceed upon this Bill, for the Preſervation of the Government, and for this Reaſon. Whereas it is inſiſted on one ſide, That here are the Laws and Liberties of *England* at ſtake, and no body knows whoſe Caſe it may be next, Sir, if we don't go upon good Grounds and Reaſons, that we don't fear any bodies following, God forbid we ſhould make this a Precedent. But pray turn the Tables on the other ſide, and ſee what the Caſe will be, that here is a Gentleman that every body of the Houſe does believe Guilty;

that he hath been in a Conſpiracy to bring in the *French*, and Depoſe the King; and the Man came before us, and we had no Power to reach him; What will be the Precedent on the other ſide? It will be eaſie to take off one of the Witneſſes by Men of great Eſtates, and then there is no coming at them, even by the Parliament themſelves: This Parliament was of Opinion, That they could not come at Sir *John Fenwick*, though they were of Opinion that he was Guilty.

But now, Sir, to that which is the Queſtion, 'Tis allowed by every Body, you may do what you pleaſe; but without ſtraining your Legiſlative Power, I ſhall offer my Thoughts and Reaſons for it, upon theſe three Points; That the Fact is Treaſon; that he is plainly Guilty; and that we have a plain Juriſdiction in this Caſe, in the Ordinary Methods and Proceedings of Parliament.

Sir, the Fact is Treaſon, the Meeting at ſeveral times, and Conſpiring, and Conſulting to bring in a *French* Power to Depoſe the King. You have been told by ſeveral Perſons, and the Counſel at the Bar, That ſuch Meetings, without ſome other Overt-Act, is not Treaſon; but I affirm the contrary, for that is an Overt-Act of Compaſſing the Death of the King; and Sir *Bartholomew Shower*, who did inſiſt upon it at the Bar, did otherwiſe Act his Part upon it at the Tryal of Mr. *Cook*; for he offered it at firſt, but afterwards he deſerted it as a thing he could not ſtand upon; for 'tis the Opinion of all the Judges, upon a late Reſolution.

Then, Sir, the Fact being Treaſon, as the Law already is, it is no Act *ex poſt Facto*. We are not making that Treaſon which was not ſo, but we are only Judging of the Fact that was Treaſon before; though if it was a doubt whether it was Treaſon or no, the Parliament hath a Power by 25 *Ed.* 3. to judge that Treaſon, that t he Courts below have no Power of.

The

The next thing is, Whether there be ſufficient Evidence of this Treaſon before us? I will put out of the Caſe, as no Concluſive Evidence at all, What *Goodman* hath ſaid upon his Oath (further than that there was ſuch a Witneſs that did and could ſwear ſuch a thing, and that he was Examined before the Jury;) and this I will take upon me to ſay, (and I will give you my Reaſon for my Opinion) That the Parliament is not obliged to two Witneſſes by any Law now in being.

It hath been told you by my ſelf in the former Debate, That from the Time of *Ed.* 3. one Witneſs in Caſe of Treaſon was ſufficient till the Statute of *Ed.* 6. Now I will prove to you, from the Statute of *Philip* and *Mary*, That by the Common Law, and all the time between the Reign of *Ed.* 3. and *Ed.* 6. one Witneſs was ſufficient for this or any other Treaſon. For that Statute of *Philip* and *Mary* does ſay, *That any Perſon that ſhall bring from beyond Sea, any Falſe and Counterfeit Coin, or be Accuſed or Impeached of any Offence concerning the Impairing, Counterfeiting, or Forging of any Coin Current within this Realm, ſhall, and may be Indicted, Arraigned, Convicted, or Attainted by ſuch-like Evidence, and in ſuch-like Manner as was Accuſtomed before the Firſt Year of King* Edward *the Sixth.* Now, What was the Reaſon of that Statute? Before the Statute of *Ed.* 6. thoſe Counterfeits were to be Tryed by one Witneſs; and therefore at this Day, and ſince the Statute of *P.* and *M.* all the Counterfeiters, and Utterers of Falſe Coin, have been Attainted by one Witneſs, though it be Treaſon.

'Tis ſaid again, That there is the Law of Nations, and the Law of God to the contrary. Gentlemen have ſaid ſeveral times already, That in Murther and Felony, one Witneſs is ſufficient, which ſaving ſome little parts of the Judgment as to the Forfeiture and Attainting of the Blood, is the ſame Penalty. We are not in the Land where that Law was in Force; for by that Law, as to Common Felons, there was

Reſtitution

Reſtitution only: But I would put a Gentleman that ſits by the Bar this Caſe, by the ſame Law of *Deuteronomy* and *Numbers*, that he hath quoted, Adultery is Death, Will he be contented, That that ſhould be ſo here? They are either all of them in Force, or none of them in Force.

I do ſay, That by the Statute of *Ed.* 2. and ever after till the Statute of *Ed.* 6. one Witneſs was ſufficient to Convict any Man of Treaſon. And I do ſay, That the Statutes of *Ed.* 6. does not conclude the Parliament from any Method of Proceedings.

The Statute ſays, *That no Man ſhall be Indicted, Arraigned, Convicted, or Attainted,* &c. *nor ſhall they proceed upon ſuch Indictment*; from which Words in the Statute, I do plainly make it appear to any Gentleman that will read it, 'tis confined only to the Courts of *Weſtminſter-Hall:* For certainly, you can't call a Bill of Attainder, to be a Proceeding upon an Indictment. What I ſay, is only to diſcharge my own Conſcience, and to ſalve the tender Conſciences of them that hear me; and therefore, I deſire them never to ſay, That there ought to be two Witneſſes, before they Anſwer what I have ſaid upon that Statute. And I do again maintain it, That that Statute does only concern the Courts below, but does in no ſort mean the Proceedings in Parliament, and no body has anſwered it in all theſe Debates.

Then, Sir, you have need but of one Witneſs, and you have had Capt *Porter* before you; who, I think, notwithſtanding all that hath been ſaid, is a Credible Witneſs. A Gentleman made ſome Objections to his Credit, and told you, he was not to be believ'd, becauſe he was in the ſame Conſpiracy, and had been in ſuch a Villanous Action: But, Sir, the ſame Gentleman hath often confined you to the Rules of *Weſtminſter-Hall*; and he hath told you, 'Tis a wrong Place here, and that a Man has not ſo good a Tryal here, as in *Weſtminſter-Hall.* Why, the thing that was ſpoke of, of his being concerned in the Aſſaſſination, and of his being

being a Fellow-Conſpirator with them, which is now urged as an Objection before you, is no Objection in *Weſtminſter-Hall.*

I would only take notice of another Objection this Gentleman made to the Witneſs, which he ſaid he had from the Bar, which was, That Capt *Porter* was not Pardoned, and he was now *drudging* for his Pardon; but that is ſo far from what ought to be quoted, that he that ſaid it, ought to be Reprimanded for it.

He made another Objection againſt his being a good Witneſs, and compared it to the Caſe of a Hundredor; but he did not remember, that the Man that was Robbed is a good Witneſs; and the Reaſon is, becauſe of the neceſſity of the thing, and that no others can be; and the Defendant in a Hundred can't be a Witneſs, becauſe there may be others; and that is the Reaſon of this Caſe.

And for the Precedents in *Rich.* 3d. and *H.* 4th's Time, no Gentleman can inſiſt upon them, conſidering the difference about the Crown, and the one Attainted the other; and they were not Reverſed upon the Point of Juriſdiction, but becauſe of the different Rights of the Kings; and no Body hath pretended to Anſwer the Caſe of the Regicides, they were not left to the Law, I mean ſuch as were actually Tryed before the Parliament: But the Parliament paſſed different Judgments on them, and ſome of them were in Cuſtody. What was told you of *Cromwel*'s Caſe and others, they go upon the ſame Reaſon, That they were not heard, though they were in Cuſtody.

Col. Wharton. A Gentleman lately told you, We had lately paſſed an Act for Tryals in Caſes of Treaſon, and now we are in this Proceeding, about doing ſomething that is contrary to it, that is a thing that would ſtick with me, if I could not Anſwer it, but I Appeal to every Gentleman in this Houſe, whether that Act hath any ſort of Relation to Tryals in Parliament; for that is only to Direct the Courts in *Weſtminſter-Hall.*

I have

I have only this to ſay, I think the Evidence very full before you; I think you have had one very good Witneſs, and the Counſel for the Priſoner had Liberty to confront him: If he had not been Guilty, the Priſoner at the Bar would have denyed it; I am convinced of the Truth of it, and my Conſcience is to make a Judgment upon it, and that is all we can go by here.

Mr. Jefferys. A Worthy Gentleman of the Long Robe hath taken pains to find out Precedents to juſtifie our Proceedings; and another ſays, there is no Act to Circumſcribe our Proceedings; but ſince Gentlemen differ ſo much, it gives me a great deal of Caution. This I know, there is a Law of the Land, by which Perſons ought to be Governed: I take this to be an Extraordinary Method of Proceedings, and I hope the Lords will take more Care of the Matter, than the Commons.

Mr. Edw. Harley. Sir, I can't ſatisfie my ſelf to be for this Bill, and in a few Words, I ſhall give my Reaſon for it: It hath been ſaid, That the Parliament is unlimitted; I do agree that we are not tyed to the Rules of *Weſtminſter-Hall*; I ſhall only mention the Reaſon why two Witneſſes are required in Caſes of High Treaſon. If any will look into the Hiſtory of *England*, they will find it hath been often the Deſign of the Crown, to Trump up Plots upon the Subject, and therefore theſe Acts took particular Care there ſhould be two Witneſſes to prove the Fact. This is the Reaſon of the Law, and I think, upon it the Liberty of the Subject is founded, and therefore I can't be for this Bill.

Then the Queſtion for paſſing this Bill was put, and the Houſe Divided.

Ayes 189. *Noes* 156.

F I N I S.

Sir *John Fenwick*'s LETTER to his Lady, upon his being Taken in *Kent*, mentioned by the Counſel for the Bill.

WHat I feared, is at laſt happen'd, had I gone alone, I had done it; but the other was betray'd from London, it is God's Will, ſo we muſt ſubmit: I know nothing can ſave my Life, but my Lord Carliſle's going over to him, back'd by the reſt of the Family of the Howards, to beg it; and offering that I will live abroad all his Time, where I cannot hurt him, and that I will never draw Sword againſt him. I muſt leave it to you what elſe to ſay, all Friends muſt be made, My Lord Devonſhire may perhaps by my Lady, my Lord Godolphin, my Lord Pembroke by my Lady Montgomery, Mr. Nelſon by the Biſhop of Canterbury, my Lord Arran might engage his Brother Selkerk to uſe his Intereſt with Keppel. I believe, if my Lord Carliſle would go, it were beſt before my Tryal, or elſe they may cut me ſhort for want of Time; if he can prevail with him for a Pardon, he will procure it as well before my Tryal, as after, or at leaſt he may prevail for a Reprieve, till ſome can come over to him. My Lord alſo will have an Opportunity to engage Benting, and get my Lord of Eſſex to joyn with him. I cannot think what elſe to ſay; but the great Care muſt be the Jury, if two or three could be got, that would ſtarve the reſt; That or nothing can ſave me. Money I know would do it, but alas, that is not to be had, nor ſhall I get enough for Counſel. I beg of you not to think of being ſhut up with me, I know it will kill you,

you, and beſides I have no ſuch Friend as you to take care of my Buſineſs, tho' it would be the Comfort of my Life, the little time it laſts, to have you with me: And I have this only Comfort now left, that my Death will make you eaſie. My Deareſt Life, grieve not for me, but reſign me to God Almighty's Will. You will hear as ſoon as they bring me to Town, where they put me, and then I would have a Servant, or ſome Body with me, and my Night-Gown. I am in a ſad Caſe with Riding; That Day I parted with you, I rid above a Hundred Miles; but be not concern'd, my Health is well enough, I am interrupted, ſo can ſay no more now. Engage Sir John Lowther *the new Lord, who hath more Intereſt than any Body. Let my Lord* Scarſdale *engage* Jermaine *to engage* Overkirke *for me, ſpeak to my Lady* Arlington. *If my Tryal could be put off till the King comes back, there would be more Opportunity to ſollicite him.*

A Copy of the PAPER delivered by Sir John Fenwick, *Baronet, to the Sheriffs of* London *and* Middleſex, *on* Tower-Hill, *the Place of Execution*, Thurſday January 28. 169$\frac{6}{7}$.

SPeaking nor Writing was never my Talent. I ſhall therefore give a very ſhort, but faithful Account, Firſt, of my Religion, and next, what I Suffer moſt Innocently for, to avoid the Calumnies I may reaſonably expect my Enemies will caſt upon me when Dead; ſince they have moſt falſely and maliciouſly aſperſed me, whilſt under my Misfortunes.

As for my Religion, I was brought up in the Church of *England*, as it is Eſtabliſhed by Law, and have ever profeſſed it; though I confeſs, I have been an unworthy Member of it, in not living up to the Strict and Excellent Rules thereof, for which I take ſhame to my ſelf, and humbly ask forgiveneſs of God. I come now to Die in that Communion, truſting as an Humble and Hearty Penitent, to be received by the Mercy of God, through the Merits of Jeſus Chriſt my Saviour.

My Religion taught me my Loyalty, which I bleſs God is untainted; and I have ever endeavoured in the Station wherein I have been placed, to the utmoſt of my Power, to Support the Crown of *England* in the True and Lineal Courſe of Deſcent, without Interruption.

As for what I am now to Die, I call God to Witneſs, I went not to that Meeting in *Leaden-Hall-Street* with any ſuch Intention as to Invite King *James* by Force to Invade this Nation; nor was I my ſelf provided with either Horſe or Arms, or engaged for any Number of Men, or gave particular Conſent for any ſuch Invaſion, as is moſt falſely Sworn againſt me.

I do alſo declare in the Preſence of God, That I knew nothing of King *James* his coming to *Calais*, nor of any Invaſion intended from thence, till it was Publickly known: And the only Notion I had that ſomething might be attempted, was from the *Thoulon* Fleet coming to *Breſt*.

I alſo

I alſo call God to Witneſs, That I received the knowledge of what is contained in thoſe Papers that I gave to a Great Man, that came to me in the *Tower*, both from Letters and Meſſages that came from *France*; and he told me when I read them to him, that the Prince of *Orange* had been acquainted with moſt of thoſe things before.

I might have expected Mercy from that Prince, becauſe I was Inſtrumental in ſaving his Life. For when about *April*, 95. an Attempt formed againſt him, came to my Knowledge, I did partly by Diſſuaſions, and partly by Delays, prevent that Deſign; which I ſuppoſe was the Reaſon that the laſt Villanous Project was concealed from me.

If there be any Perſons whom I have injur'd in Word or Deed, I heartily pray their Pardon, and beg of God to Pardon thoſe who have injured me; particularly thoſe who with great Zeal have ſought my Life, and brought the guilt of my Innocent Blood upon this Nation, no Treaſon being proved upon me.

I return my moſt hearty Thanks to thoſe Noble and Worthy Perſons who gave me their Aſſiſtance by oppoſing this Bill of Attainder, without which, it had been impoſſible I could have fallen under the Sentence of Death. God bleſs them and their Poſterity; though I am fully ſatisfied they Pleaded their own Cauſe while they Defended mine.

I pray God to bleſs my True and Lawful Sovereigns, King *James*, the Queen, and Prince of *Wales*, and Reſtore him and his Poſterity to this Throne again, for the Peace and Proſperity of this Nation, which is impoſſible to proſper till the Government is ſettled upon a right Foot.

And now, O God, I do with all Humble Devotion Commend my Soul into thy Hands, the Great Maker and Preſerver of Men, and Lover of Souls, beſeeching thee, That it may be always dear and precious in thy Sight, through the Merits of my Saviour Jeſus Chriſt, Amen.

J. FENWICK.

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